# TRANSCRIPT OF RECORD.

## Supreme Court of the United States.

October Term, 1[redacted]1916

No. 5[redacted]192

NORFOLK SOUTHERN RAILROAD COMPANY,
PLAINTIFF IN ERROR,

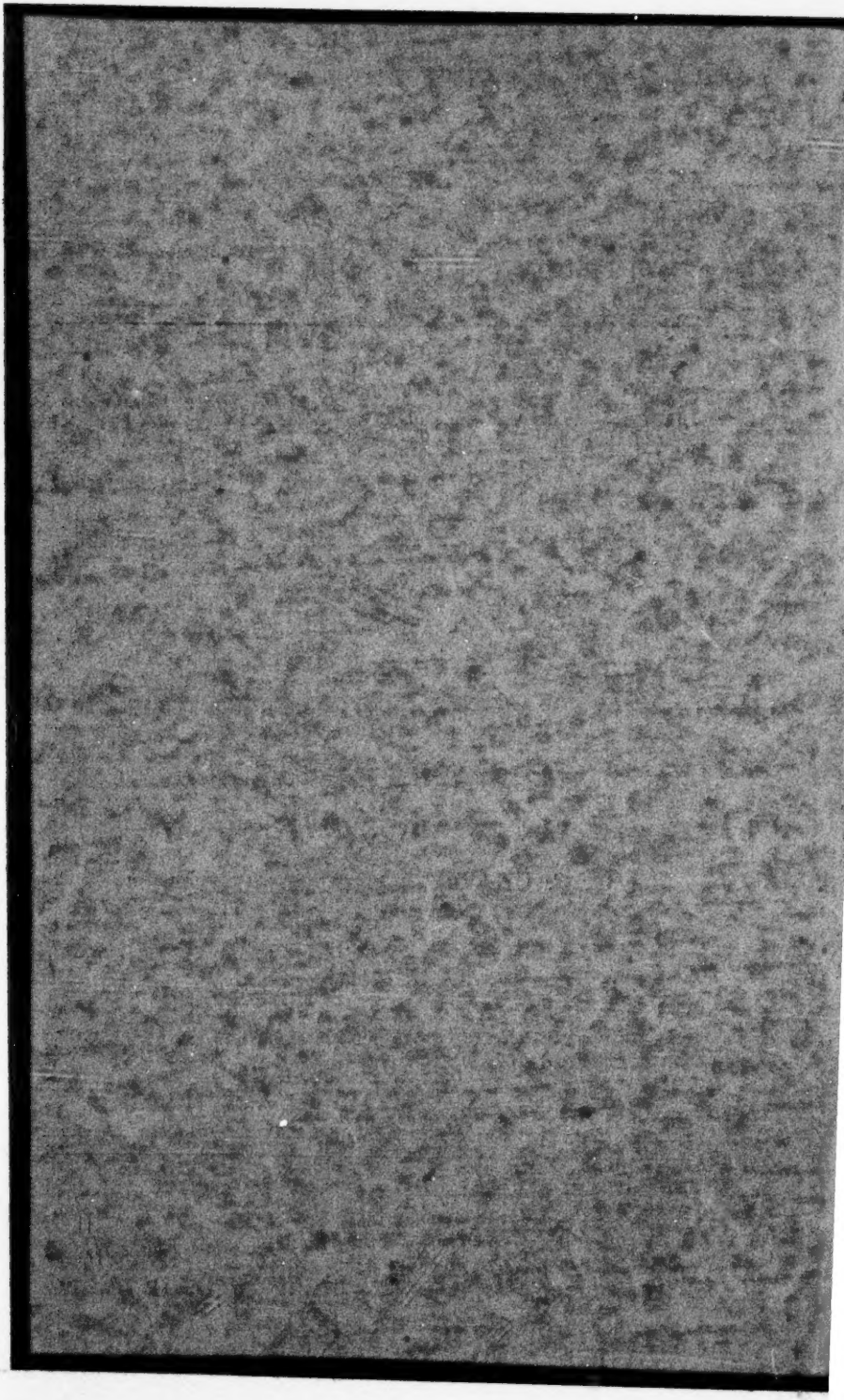
*versus*

W. C. CHATMAN, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Record Filed July 12-1915

(24,839)



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UNITED STATES OF AMERICA, ss:

At a United States Circuit Court of Appeals for the Fourth Circuit, begun and held at the Court House, in the City of Richmond, on the first Tuesday in February, being the second day of the same month, in the year of our Lord one thousand nine hundred and fifteen.

Present: Hon. J. C. Pritchard, Circuit Judge; Hon. Martin A. Knapp, Circuit Judge; Hon. Charles A. Woods, Circuit Judge.

Among other were the following proceedings, to-wit:

Norfolk Southern Railroad Company,
Plaintiff in Error,
*versus*
W. C. Chatman, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of North Carolina, at Elizabeth City.

Be it Remembered that heretofore, to-wit, on May 9, 1914, the transcript of the record of the said District Court in the said entitled cause was transmitted to and filed in our said Circuit Court of Appeals here, which is as follows:

# TRANSCRIPT OF RECORD.

Filed May 9, 1914.

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UNITED STATES OF AMERICA,
Eastern District of North Carolina, } to-wit:

At a District Court of the United States for the Eastern District of North Carolina, begun and held at the court-house, in the city of Elizabeth City, on the second Monday in October, 1913, it being the 13th day of October, in the year of our Lord one thousand nine hundred and thirteen.

Present: The Honorable Henry G. Connor, Judge of the District Court for the Eastern District of North Carolina.

Among other were the following proceedings, to-wit:

**COMPLAINT.**

Filed November 6, 1912.

NORTH CAROLINA,
Perquimons County.

IN THE SUPERIOR COURT, SPRING TERM, 1912.

W. C. Chatman, plaintiff,
against
Norfolk Southern Railroad Company, defendant. } Complaint.

The plaintiff complaining of the defendant alleges:

1. That the defendant, Norfolk Southern Railroad Company is and was at the time hereinafter set out a corporation operating trains for the carriage of passengers and freight between Norfolk, Virginia and Hertford, North Carolina, and other points.

2. That on or about the third day of December, 1911, the plaintiff was a passenger upon defendant's train, the plaintiff at the time being in charge of a certain shipment of horses and riding in said car with the knowledge and consent of the defendant by virtue of a Drovers pass issued to plaintiff together with the bill of lading for said shipment.

3. That on account of the negligence of the defendant in permitting its roadbed to become defective, on account of said defendants use of defective rolling stock, on account of the improper operation of defendants trains (2) and other acts of negligence on the part of the defendant, the train and car upon which plaintiff was riding as aforesaid was wrecked and derailed near and just south of Moyock, North Carolina.

4. That when said train was derailed and wrecked as aforesaid plaintiff was thrown violently upon his head and caused to suffer great bodily pain and other damage.

5. That by reason of the injuries so received plaintiff has suffered great and lasting mental anguish, has suffered great bodily pain, has been permanently injured in his back, hips, internal organs and other parts of his body, has suffered great pecuniary loss by reason of said injuries in addition to his bodily and mutual pain and anguish to his great damage in the sum of six thousand dollars.

Wherefore plaintiff prays for judgment against the said defendant for the sum of six thousand dollars, for costs of this action and for such other and further relief as the circumstances may demand.

P. W. McMULLAN,
CHAS. WHEDBEE,
Attorneys for Plaintiff.

W. C. Chatman, the plaintiff, being duly sworn, says that the foregoing complaint is true of his own knowledge, except as to those matters and things therein stated upon information and belief and as to those he believes it to be true.

W. C. CHATMAN.

Subscribed and sworn to before me this 8th day of August, 1912.

CHAS. JOHNSON,
Clerk Superior Court, Perquimons County.

(3) (Returned and filed January 15th, 1912.)

STATE OF NORTH CAROLINA,
Perquimons County.

IN THE SUPERIOR COURT.

W. C. Chatman,
against
Norfolk Southern Railroad Company. } Summons for Relief.

The State of North Carolina, to the Sheriff of Perquimons County—Greeting:

You are hereby commanded to summon Norfolk Southern Railroad Company, the defendant above named, if it be found within your county, to be and appear before the judge of our Superior Court, at a court to be held for the county of Perquimons at the courthouse in Hertford, on the 4th Monday in March, 1912, and answer the complaint which will be deposited in the office of the clerk of the Superior Court of said county within the first three days of the term, and let the said defendant take notice that if it fail to answer the said complaint with that term, the plaintiff will apply to the court for the relief demanded in the complaint, and the cost of this action to be taxed by the clerk.

Herein fail not, and of this summons make due return.

Given under my hand and seal of said county, this 15th day of January, 1912.

CHAS. JOHNSON,
Clerk Superior Court of Perquimons County.

**SHERIFF'S RETURN.**

W. C. Chatman against Norfolk Southern Railroad Company.

Summons for relief, returnable to March term, 1912, of the Superior Court of Perquimons county.

Received Jan'y 15th, 1912, served Jan'y 15th, 1912, by reading within summons to and leaving copy of same with C. W. Gaither, agent of defendant, Norfolk Southern Railroad Company.

B. F. BRAY,
Sheriff, Perquimons County.

**ORDER OF REMOVAL.**

(4) Filed October 6th, 1912.

SUPERIOR COURT, PERQUIMONS COUNTY, FALL TERM, 1912.

W. C. Chatman,
*vs.*
Norfolk Southern Railroad Company.

Upon consideration of the petition for removal filed in this cause, with bond as required by law, it is ordered and adjudged by the court that this cause be and the same is hereby removed to the United States District Court for the Eastern District of North Carolina for trial and that this court take no further proceedings in same.

Clerk of this court will certify to said district court a true and perfect copy of the record in this cause.

HENRY P. LANE,
Judge Presiding.

**ORDER OF REMOVAL FROM RALEIGH DIVISION TO ELIZABETH CITY DIVISION.**

Filed November 6, 1912.

It is hereby directed upon consent of all parties concerned that the above entitled case be transferred from the Raleigh division to the Elizabeth City division of the U. S. District Court.

It is further directed that the clerk of the U. S. Court at Raleigh transmit all the papers in the above entitled case to the clerk at Elizabeth City at once.

This Oct. 15th, 1912.

H. G. CONNOR,
United States District Judge.

**ANSWER.**

(5) Filed October 5, 1912.

The defendant, for answer to the complaint filed herein, says:

1st. It is admitted that the Norfolk Southern Rail-

road Company is and was a corporation originally incorporated under the laws of the State of Virginia, and was at the time mentioned in the complaint, engaged in operating a line of railroad, running from the City of Norfolk, in the State of Virginia, to the town of Hertford, in the state of North Carolina, and to other points in said state, and as such was a common carrier engaged in interstate commerce by railroad.

2nd. The matters alleged in section two of the complaint are denied.

It is admitted that on the 3rd day of December, 1911, plaintiff was riding upon defendant's train, and was at said time in charge of a certain shipment of horses and was riding in the car with said horses. Defendant is advised that plaintiff was illegally riding upon said train and without authority in law so to do.

3rd. The matters alleged in section three of the complaint are denied.

4th. The matters alleged in section four of the complaint are denied.

5th. The matters alleged in section five of the complaint are denied.

For a further and separate answer and defense, this defendant says:

(6) 1st. That on the first day of December, 1911, plaintiff entered into a contract with the Pennsylvania Railroad Company, a corporation engaged in interstate commerce by railroad, for the transportation of a certain lot of horses. A copy of said contract is hereto attached and made a part hereof, except that the said copy does not state the amount of freight which was to be paid for transporting the said stock. On or about the ——— day of December, 1911, the said stock was delivered to this defendant at Berkley, Va., to be by it transported to Hertford, in the State of North Carolina, under the terms of the said contract; and this defendant received said shipment in accordance with the terms of the said contract. The contract, among other things, contained a release duly signed by the said W. C. Chatman, in words and figures, as follows:

"In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract without charge, other than the sum paid or to be paid for the carriage upon said freight train of the live stock mentioned in said contract, of

which live stock in charge, the undersigned do hereby voluntarily assume all risk of accidents or damage to person or property, and do hereby release and discharge the said carrier or carriers from every and all claims, liabilities or demands of every kind, nature and description for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employees or otherwise."

That if the said contract was valid in law and binding, then this defendant especially sets up and pleads said release in discharge of the cause of action stated in the complaint.

For further and separate defense, this defendant says:

1st. Acting under the constitution of the United States and that clause thereof commonly known and referred to as the "commerce clause," the Congress of the United States has passed certain statutes regulating interstate commerce, to-wit: An act entitled an Act to Regulate Commerce, approved Feb. 4, 1887, and amended by certain acts, to-wit, an act approved June 29, 1906, and an act approved April 13, 1908, and an act approved Jan. 25, 1909; and an act approved June 8, 1910, and (7) certain other amendments thereunto made, the whole being commonly known as the act to regulate interstate commerce.

By the said act it was made the duty of all common carriers, subject to the provisions of this act, to establish, observe and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates or tariffs, the issuance, form and substance of tickets, receipts and bills of lading, the manner and method of presenting, marking, packing and delivering property for transportation, the facilities for transportation, the carrying of personal, sample and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing and delivery of property subject to the provisions of said act.

By the terms of the said act it was provided that no common carrier subject to the provisions of the said act should, after the first of January, 1907, directly or

indirectly issue or give any interstate free ticket, free pass or free transportation for passengers, except to certain enumerated parties, and plaintiff is not in the class or among those enumerated by the said act, to whom free transportation might be given; that by the terms of the said act it was made unlawful for any person, other than those enumerated in said act to ride upon any interstate railroad in interstate transportation, without having duly paid fare therefor.

By the terms of the said act it was further provided that common carriers, engaged in interstate commerce by railroad, should not engage in or participate in the transportation of passengers or property, unless the rates, fares and charges upon which the fare or trans-
(8) portation by said carrier have been filed and published in accordance with the provisions of the said act, nor shall any carrier charge or demand, or collect, or receive a greater or less or different compensation for such transportation for passengers or property, or for any services in connection therewith between the points named in such tariff, than the rates, fares and charges which are specified in the tariff filed and in effect at the time, and by the terms of the said act it was made unlawful for any person to obtain from any carrier of interstate commerce by railroad, any transportation at less than the regular rates then established and in force on the line of such transportation. This defendant is a railroad company operating a line of railroad from Berkley, Virginia, to Hertford, North Carolina, and was at the time referred to in the complaint, and at the time of the said accident referred to in the complaint actively engaged in interstate commerce and was subject to the provisions of the said act, and in making transportation of said horses for plaintiff and plaintiff's riding in said car were acts of interstate commerce and both plaintiff and defendant were subject to all provisions of the said act.

Defendant has duly filed with the Interstate Commerce Commission, and has duly published, in accordance with the terms of said act a tariff of rates showing the rate on horses from Berkley, Virginia, to Hertford, North Carolina, and under said tariff the said railroad was not permitted or authorized to carry plaintiff free of charge, but under the terms of the said tariff before plaintiff could ride upon said train free of charge plaintiff was required by law to pay his fare therefor.

Defendant shows and alleges that plaintiff was riding upon said train in violation of the laws of the country, and without the consent of the defendant, and if it should be found that he was riding with the consent of any agent of the defendant, the said agent had no power (9) or authority to permit plaintiff to ride thereon in violation of the law, and this defendant especially sets up and pleads and claims the benefit and protection of the said acts aforesaid regulating interstate commerce. This defendant alleges that the plaintiff was at the time of the said accident riding upon said train in violation of the laws of the United States, being an act to regulate commerce between the States, commonly known as the Interstate Commerce Act, and was engaged in an unlawful enterprise, and this defendant especially sets up and pleads the said acts as a defense to this cause of action.

Wherefore, this defendant prays judgment, that this action be dismissed, that the defendant go without day and recover of the plaintiff and the surety upon his prosecution bond, the costs of this action, to be taxed by the clerk.

W. B. RODMAN,
Attorney for Defendant.

VIRGINIA,
City of Norfolk.

J. H. BARRETT, being first duly sworn, says he is an officer of the defendant company, to-wit, General Claim Agent; that he has read the foregoing answer and knows the contents thereof, and the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

J. H. BARRETT.

Sworn to and subscribed to before me, this 17th day of September, 1912.

(Notary Seal) J. R. PRITCHARD,
Notary Public.

My commission expires 20th day of January, 1912.

Note.—A copy of F. D. 2660 A. Pennsylvania R. R Co. Coupon to Uniform Live Stock Contract No. 872 is attached to this answer and copied in full in the Bill of Exceptions. See page ——, printed record.

## REPLY OF PLAINTIFF TO NEW MATTER SET OUT IN ANSWER.

(10) Filed April 14, 1913.

The plaintiff, replying to the new matter set out in the answer in this cause, says:

1st. That it is true that the plaintiff and the Pennsylvania R. R. Co. entered into a contract on the first day of December, 1911, for the transportation of a certain lot of horses, and that on or about the day of December, 1911, the said stock was delivered by the Pennsylvania R. R. Co. to the defendant company for transportation to Hertford, N. C., under the terms of said contract. The plaintiff has no recollection or knowledge, however, of signing any paper whatsoever save and except a paper writing, now in plaintiff's possession, evidencing the plaintiff's right to accompany said shipment of stock as the man in charge of said shipment, which said paper writing was signed by the plaintiff for the reason that it contained a representation as to the condition of said stock, and was delivered to the plaintiff by the agent of the said Pennsylvania Railroad in consideration of the price to be paid by the plaintiff for the transportation of said stock and of the plaintiff's caring for said stock en route. Section 1st of defendant's further and separate answer and defense, except as herein expressly admitted, is therefore denied. And plaintiff especially avers that if he signed a contract, a copy of which is attached to the said defendant's answer, his signature thereto was induced by the fraudulent concealment of said agent of the true contents of said contract, without knowledge or means of knowledge on the plaintiff's part that it con-
(11) tained the release from liability set out in said first section, and in the honest belief on the part of the plaintiff, induced by said fraudulent concealment on the part of said agent, that the plaintiff was signing no more than the paper writing, above referred to, as being now in the plaintiff's possession. And plaintiff is advised and so avers that by reason of said fraudulent concealment on the part of said agent that said paper writing, purporting, as aforesaid, to contain said release from liability, even if signed by plaintiff, which the plaintiff as aforesaid denies is void. And plaintiff is further advised, and so avers, that said pretended release from liability is contrary from public policy, forbidding by law and void.

2nd. That it is admitted that the Congress of the United States has passed several statutes regulating interstate commerce, which, together with the amendment to said statutes, are commonly known as an act to regulate interstate commerce. It is further admitted that the Congress acted within the limitation of a constitutional authority in so doing. Except as herein expressly admitted, section 1st of the defendant's further and separate defense is denied. And it is particularly denied that the plaintiff was, by the terms of said act, or otherwise, riding upon defendant's train at the time of his injury in violation of law. And the plaintiff especially sets out and pleads the following provision of section 1 of said act, viz: "No common carrier subject to the provisions of this act shall, after January the first, 1907, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation of passengers, except to its employees and their families, its officers, agents, surgeons, physicians and attorneys at law; * * * to necessary care takers of live stock, poultry, milk and
(12) fruit."

Wherefore plaintiff reiterates his prayer for the relief demanded in his complaint.

P. W. McMULLAN and
CHAS. WHEDBEE,
Attys. for Plaintiff.

W. C. Chatman, the plaintiff, being first duly sworn, says that the foregoing reply is true of his own knowledge, except as to the matters and things therein stated on information and belief, and as to those he believes it to be true.

W. C. CHATMAN.

Sworn to and subscribed before me this 14 day of April, 1913.

CHAS. JOHNSON,
(Seal of Court) Clerk Superior Court.

**JURY TRIAL, OCTOBER 16, 1913.**

(13)

This cause coming on to be heard, upon the complaint and answer, it is ordered by the court that a jury of good and lawful men come to try the issues joined.

Thereupon, the following good and lawful men are chosen and duly empanelled to try the issues joined: T. C. Fletcher, J. A. Matthews, J. C. Dail, J. F. T. Sawyer, W. S. Blanchard, T. C. Blanchard, A. Davenport, C. H. Lane, R. T. Davis, F. M. Newby, J. K. Parker and W. E. Hendrix, who, each for himself, answer the issues in the above cause as follows, to-wit:

**ISSUES AND ANSWERS.**

Filed October 16, 1913.

1st. Was plaintiff injured by the negligence of the defendant as alleged in the complaint? Answer: Yes.

2nd. What damage, if any, is plaintiff entitled to recover? Answer: $1,550.00 (fifteen hundred and fifty dollars.)

**JUDGMENT.**

(14) Filed October 16, 1913.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

W. C. Chatman, plaintiff,
*vs.*
Norfolk Southern Railroad Co., defendant.

Present: Hon. H. G. Connor, judge, presiding.

This cause coming on to be heard and the jury having found all the issues in favor of the plaintiff as set out in the record, it is ordered and adjudged by the court that the plaintiff, W. C. Chatman, recover of the defendant, Norfolk Southern Railroad Company, the sum of fifteen hundred and fifty dollars and the costs of this action to be taxed by the clerk.

H. G. CONNOR, Judge.

Defendant moves to set aside the verdict and for new trial. Motion denied and defendant excepts. Judgment for plaintiff. Defendant excepted and appealed to U. S. Circuit Court of Appeals. Appeal bond fixed at $250.00. Bond to stay execution fixed at $2,000. Defendant allowed six months to apply for writ of error.

H. G. CONNOR, Judge.

## BILL OF EXCEPTIONS NO. 1.

(15) Filed March 23, 1914.

Be it remembered, that afterwards, to-wit, at the October term of said court at Elizabeth City, before his Honor Henry G. Connor, district judge, the issues joined in the above stated cause came on to be tried before said judge and a jury, the plaintiff being represented by P. W. McMullan and Chas. Whedbee, his attorneys, and the defendant being represented by W. M. Bond, Claud M. Bain and J. Kenyon Wilson, its attorneys, and the following proceedings were had, to-wit:

### Issues Tendered by Defendant.

After the jury had been duly chosen, sworn and empanelled to try the issues between the plaintiff and defendant, the defendant requested the court to submit the following three issues to the jury, to-wit:

1st. Was the plaintiff injured by the negligence of the *defen* while lawfully riding on the defendant's train as a passenger, as alleged in the complaint?

2nd. What damage, if any, is the plaintiff entitled to recover for said injury?

3rd. Did the plaintiff assume the risks of injury in traveling upon defendant's train and release defendant therefrom?

The court declined to submit these issues. To the ruling of the court the defendant excepted. This was the first exception.

### Issues Tendered to Jury.

(16) The plaintiff then tendered the following issues:

Was plaintiff injured by the negligence of the defendant as alleged in the complaint? Answer.

2nd. What damage, if any, is plaintiff entitled to recover? Answer.

The defendant in apt time objected to the submission of these issues, which objection was overruled and the issues submitted to the jury. To which ruling of the court the defendant in apt time excepted. This was the second exception.

W. C. CHATMAN.

**Testimony of W. C. Chatman, Plaintiff.**

The plaintiff, W. C. CHATMAN, testified as follows:

My name is W. C. Chatman. I remember traveling on a freight train of the Norfolk Southern railroad some time in the early part of December of 1911 with a shipment of horses. I took passage at Jersey City, New Jersey, on the Pennsylvania railroad, and traveled on that road to Cape Charles, Va.; then we came across on a barge to Norfolk. While I was in Jersey City, the man who had my horses loaded, after all the horses were loaded, gave me this bill about 5 o'clock in the afternoon.

Paper referred to by witness was read to the jury and is in the following language:

F. D. 2660

Pennsylvania Railroad Company.

Coupon to Uniform Live Stock Contract No. 872.

120 Jersey City Station, Dec. 1st, 1911.

W. C. Chatman delivered to the Pennsylvania Railroad Company, (subject to all the conditions of the Uniform Live Stock Contract, executed as of even date herewith and now in the possession of the said Company, of which this coupon is part) Live Stock of the kind and number, and consigned and destined as follows:—

(17) Consignee W. C. Chatman,
Destination Pt. Norfolk, Va.
For Hertford, N. C.
one chartered car,
Number and description of Stock containing, (shipper's load and count) nine (9) horses, one (1) stud horse and one (1) colt. Released to a valuation of $100.00 each, watered & fed at 12 noon P. M.
W. C. Chatman, man in charge.
Weight subject to correction.....
Advances $ .....
Car Nos. and Initials, Penna. Co. 581461.

Witness his hand and seal the day and year above written.

(Said shipper hereby states that the said animals *tenteded* to the carrier for shipment are not affected with glanders.)

W. C. CHATMAN, Shipper (Seal)

Attest:

E. BUTLER,
per M. Company's Agent.

Witness further testified that he came on the Pennsylvania Railroad to Cape Charles and came across on a barge to somewhere in Norfolk, and they carried the car with him in it up to the stock yards. The horses were not transferred and he did not say anything to any one about carrying him anywhere. That he was at the station in Norfolk he saw the conductor who was making up the train in which this car was, and the conductor saw him and knew that he was in the car. He did not say anything about bringing him out over the Norfolk Southern. He asked the conductor what time the train left and was informed about one o'clock; that he came out over the Norfolk Southern tracks. When the train reached a place near Moyock, just to the south of Moyock, he was leaning over a piece of scantling, tieing the head of one of the horses down, and while attending to this duty he was pitched over on his head under the horses, the light went out, and after he came to he crawled to the door and got out and found that the car had been derailed. The trucks had been reversed and brought from the end of the car towards the middle and it lacked only just a little of going over. He was very seriously injured by reason of the fall and was confined to his room and on crutches for quite a long time, and was permanently injured. After he got out of the car and made an examination he found that the road bed was torn up for (18) quite a distance and that for quite a long space the ties were rotten, so rotten that the rails turned over on the side and the engine was running along on the side of the rails after they had been turned over. That he got in the car with the horses at Jersey City at the direction of the agent who gave him the bill referred to, and that he gave no directions to any one about what to do with the car, and the horses were not transferred; that he stayed in the car to the knowledge of the conductor of the Norfolk Southern Railroad Company to the time the car was derailed.

Dr. T. S. McMULLAN

W. C. CHATMAN.

Dr. W. B. SHARP
W. R. SAWYER
C. J. JENKINS
JOHN T. JESSUP

CROSS EXAMINATION.

Witness W. C. Chatman is shown a paper (hereinafter copied in full on pages —— as Pennsylvania Railroad Company Uniform Live Stock Contract No. 872), and testified:

I admit that to be my signature. This (indicating the coupon) was the only paper of any kind that I had, and it was given me in Jersey City. I did not pay any freight, I got no paper from anybody after I got to Norfolk, but went right along with the car.

On cross examination witness admitted his signature to the paper known as Pennsylvania Railroad Company Uniform Live Stock Contract No. 872; that he paid no freight, got no paper from any one else; the coupon was the only paper he had, but came right along with the car until it was derailed, and that he gave no instructions about it.

On re-direct examination witness testified that he did not know what was on the bill of lading that he signed; that nothing was said by Pennsylvania agent in regard to the contract; that he signed the paper and got in the car, to look after the stock, feed and water them.

Dr. T. S. McMULLAN and Dr. W. B. SHARP testified to the injury of the plaintiff to the effect that the plaintiff was confined to his room for quite a while and that he was permanently injured in his back.

W. R. SAWYER, C. J. JENKINS and JOHN T. JESSUP testified as to the condition of the track where the wreck occurred near Moyock, the testimony being to the effect that for quite a long distance the ties of the railroad track were punk rotten, so badly rotten that they would (19) not hold a rail.

There were other witnesses and other testimony introduced by the plaintiff as to the wreck, and on the question of damages, but this evidence is not set out, as it is not deemed material on this appeal.

The plaintiff then rested.

Defendant then moved the court to direct a verdict for the defendant, which motion was overruled by the court and defendant excepted. This was the third exception.

**Defendant's Evidence.**

Defendant first offered in evidence live stock contract, in the following language:

F. D. 2660.

Pennsylvania Railroad Company.

No. 872.

Uniform Live Stock Contract.

120 Jersey City Station, Dec. 1st, 1911.

This Agreement, made this the 1st day of December, 1911, by and between the Pennsylvania Railroad Company, hereinafter called the carrier, and W. C. Chatman, hereinafter called the shipper.

Witnesseth, That the said shipper has delivered to the said carrier live stock of the kind and number, and consigned and destined by said shipper, as follows:

| Consignee, Destination, etc. | Number and Description of Stock and Count; Weight, Subject to Correction; Shipper's Load. |
|---|---|
| W. C. Chatman,<br>Port Norfolk,<br>For Hertford, N. C. C/o<br>E. S. D. | One chartered car containing 9 horses, 1 stud, and one (1) colt. Released to a valuation of $100.00 each. Watered and fed by shipper at 12 noon, P. M. W. C. Chatman, man in charge. |

Advance charges $.....
Car Nos. and initials Penna No. 581461:

For transportation from 120 Jersey City, to destination, if on said carriers line of railroad, otherwise to the place where said live stock is to be received by the connecting carriers for transportation to or towards des-

tination, and that the same has been received by said carrier for itself and on behalf of connecting carriers for transportation, subject to the official tariffs, classifications and rules of the said company, and upon the following terms and conditions, which are admitted and ac-
(20) cepted by the shipper as just and reasonable, viz:

The said shipper, or the consignee, is to pay freight charges thereon to the said carrier at the rate of —— per ——— which is the lower published tariff rate, based upon the expressed condition that the carrier assumes liability on the said live stock to the extent only of the following agreed valuation, upon which valuation is based the rate charged for the transportation of the said animals, and beyond which valuation neither the said carrier, nor any connecting carrier shall be liable in any event, whether the loss or damage occur through the negligence of the said carrier or connecting carriers or their employees or otherwise.

If horses or Mules—not exceeding.....$100.00 Each
If cattle or cows—not exceeding..... 75.00 "
If fat hogs or fat calves—not exceeding... 15.00 "
If sheep, lambs, stock, hogs, stock calves,
or other small animals—not exceeding... 5.00 "

and in no event shall the carriers liability exceed $1,-200, upon any car load. That said shipper is to pay all back charges and freight charges paid by said carrier or connecting carrier upon or for the transportation of said live stock.

That the said shipper is at his own sole risk and expense to load and take care of and feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload the same; and neither said carrier or any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same. That the said shipper is to inspect the body of the car or cars in which said stock is to be transported and satisfy himself that they are sufficient and safe, and in proper order and condition, and said carrier or any connecting carrier shall not be liable, on account of any loss or injury to said stock happening by reason of any alleged insufficiency in or defective condition of the body of said car or cars.

That said shipper shall see that all doors and openings in said car or cars at all times so closed and fastened as to prevent the escape therefrom of any of the said

stock and said carrier or any connecting carrier shall not be liable on account of the escape of any of the said stock from said car or cars.

The said carrier or any connecting carrier shall not be liable for or on account of any injury sustained by said live stock, occasioned by any or either of the following causes, to-wit: Overloading, crowding one upon another, kicking or goring, suffocating, fright, burning of hay or straw or other material used for feeding or bedding, or by fire from any cause whatever, or by heat, cold or by changes in weather, or for delay caused by stress of weather, by obstruction of tract, by riots, strikes or stoppage of labor, or for causes beyond their control.

That in the event of any unusual delay or detention of said live stock, caused by the negligence of the said carrier, or its employees, or its connecting carriers, or their employees, or otherwise, the said shipper agrees to accept as full compensation for all loss or damage sustained thereby the amount actually expended by said shipper, in the purchase of food and water for the said stock, while so detained. That no claim for such damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the P. R. R. agent of the said carrier, at his office in Port Norfolk, Va., for Hertford, N. C., within five days from the time said stock is removed from said car or cars and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs.

(21) That whenever the person or persons accompanying said stock under this contract, to take care of the same shall leave the caboose and pass over or along the cars or track of said carrier, or of connecting carriers, they shall do so at their own sole risk of personal injury, from whatever cause, and neither the said carrier, nor its connecting carriers, shall be required to stop or start their trains or caboose cars at or from the depots or platforms, or to furnish lights for the accommodations or safety of the persons accompanying said stock to take care of the same under this contract.

And it is further agreed by said shipper, that in

consideration of the premises and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carriers without charge, other than the sum paid or to be paid for the transportation of the live stock in his or her charge, that the said shipper shall and will indemnify and save harmless said carrier and every connecting carrier from all claims, liabilities and demands of every kind, nature and description, by reason of personal injury sustained by said person or persons so in charge of said stock, whether the same be caused by the negligence of said carrier or any connecting carrier, or any of its or their employees, or otherwise.

And W. C. Chatman does hereby acknowledge that he had the option of shipping the above described live stock at a higher rate of freight according to the official tariffs, classifications and rules of the said carrier and connecting carriers and thereby receiving the security of the liability of the said carrier and connecting railroad and transportation companies as common carriers of the said live stock upon their respective roads and lines, but have——— voluntarily decided to ship same under this contract at the reduced rate of freight above first mentioned.

PENNSYLVANIA RAIROAD COMPANY,
By E. BUTLER, Station Agent.
per M

(Said shipper hereby states that the said animals tendered to the carrier for shipment are not affected with glanders.)

Witness my hand

W. C. CHATMAN, Shipper,
By Shipper's Agent.

JOHN A. McMAHON,
Witness.

(The release for man or men in charge is printed on the reverse of this sheet.)

RELEASE FOR MAN OR MEN IN CHARGE.

In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract without charge, other than the sum paid or to be paid for the carriage upon said freight

train of the live stock mentioned in said contract, of which live stock ——— in charge, the undersigned do ——— hereby voluntarily assume all risks of accidents or damage to —— person or property, and do hereby release and discharge the said carrier or carriers from every and all claims, liabilities and demands of every kind, nature and description for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employees or otherwise.

(Signature of man in charge.)
W. C. CHATMAN.

JOHN A. McMAHON,
Witness.

Defendant then offered in evidence certified copy of statement by John H. Marble, secretary of the Interstate Commerce Commission, as follows:

(22) INTERSTATE COMMERCE COMMISSION,

Washington.

I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached contain true and correct extracts from the schedules therein more particularly described, said schedules having been lawfully filed with the said Interstate Commerce Commission on dates specified in said papers, and being in force throughout the month of December, 1911.

In witness whereof, I have hereunto set my hand and affixed the seal of said Commission this 11th day of September, A. D., 1912.

(Seal of Interstate Commerce Commission)

JOHN H. MARBLE,
Secretary of the Interstate Commerce Commission.

Extracts from Pennsylvania Railroad Company all-rail joint freight tariff G. O.-I. C. C. No. 2710, filed on October 18th, 1910, and in force throughout the month of December, 1911:

Page A-69

POINTS FROM WHICH RATES APPLY AND RATE BASES APPLICABLE.

For explanation of same, see Pages A-146 to A-154.

| Station. | Line on which located. | To points in territorial Location shown on pages 1 to 486. W |
|---|---|---|
| * * | * * | * * * |
| Newark, N. J. | Penn. | 1 |

Page A-134.

RULES AND REGULATIONS GOVERNING TARIFF*—Continued.

| Item No. | Subject | Instructions. |
|---|---|---|
| * * | * * * | * * * * |
| B-1587 | Live Stock—Non-Application of Class Rates. | Class rates published herein will not apply on shipments of live stock to points in Territorial Location W, Subject to Classification Notes AA and BB. |

* * * * * * *

Page A-146.

BASES FOR CONSTRUCTING RATES FROM INTERIOR EASTERN POINTS.

Explanation of Rate Bases Numbers shown in list of points from which Rates apply, as Enumerated on Page A-38 to A-90, inclusive.

| To make Rates from Points Taking Rate Basis | Add to Rates Published From | * * * |
|---|---|---|
| No. 1 | Apply New York, N. Y. | Class and Commodity Rates. |

* * * * * * *

Penna. R. R. I. C. C.-G. O. No. 2710, continued.

Page A-161

Item No. B.-1611.

GROUPS OF ORIGIN—EXPLANATION.

A—New York, N. Y.

* * * * * * *

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Page 232

For list of Interior Eastern Points and Basis Rates Therefrom.

(23) See Pages A-38 to A-90, inclusive.

| Station No. | Territorial Location. | Norfolk Southern Railroad Co. Norfolk Division. |
|---|---|---|
| * * * | * * * | * * * |
| * * * | Main Line. | * * * |
| *29 W* | * * * | * * * |
| * * | Hertford, N. C. | * * * |

Classification—See Note BB, Item No. B-1598.

* * * * * * *

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Extracts from Pennsylvania Railroad Company Joint Freight Tariff G. O.-I. C. C. No. 929, filed on December 20, 1909, and in force throughout the month of December, 1911.

Page 2.

* * * * * * *

CARRIERS PARTICIPATING IN THIS TARIFF.

* * * * * * *

Intermediate and Terminal Lines
New York, Philadelphia and Norfolk Railroad..FX4-No. 9

* * * * * * *

Page 3.

STATION FROM WHICH RATES APPLY.

| From Stations On Pennsylvania Railroad and connections as shown in G. O.-I. C. C. No. 402, supplements thereto and reissues thereof, indicated by | | Rates shown on pages 4 and 5 and 8 to 26 opposite Rate Bases |
|---|---|---|
| Nos. | Names. | |
| 52 to 281 | Pennsylvania Railroad. New York (Lighterage Del'y.) Lawrence, N. J. | New York. |

* * * * * * *

Page 5.

EXCEPTIONS.

| Commodities | From Stations Referred to on page 3 taking Rate Basis | To Stations Norfolk, Va. |
|---|---|---|
| * * | * * | * * * |
| Live Stock released, subject to the rules and regulations of the Official Classification (Note 1) Carloads: Horses and Mules | New York | 2d Class |

* * * * * * *

(24) Penna. R. R. G. O.-I. C. C. No. 929, continued.

Page 6.

EXPLANATORY STATEMENTS.

Note 1. The Official Classification referred to is Official Classification, L. C. C.-O. C. No. 35, P. S. C.-2 N

Y.- O. C. No. 35, (F. S. Holbrook, Agent), suplements thereto and reissues thereof.

* * * * * * *

Extracts from Pennsylvania Railroad Company List of Stations and Agencies, A. D. 80, G. O.-I. C. C. No. 402, filed on August 31, 1908, and in force throughout the month of December, 1911:

Page 43.

ALPHABETICAL LIST OF STATIONS.

| Station Number | Name of Station | Location |
|---|---|---|
| * * | * * * * | * * |
| 169 | Newark N Y. | |
| 165) | 736 & 738 Broad St. | |
| 166) | Market Street | New York Division |
| 167) | | |
| 162 | River Street | |
| 171 | South Street* | |

* * * * * * *

Extracts from Official Classifications No. 37, F. S. Holbrook, Agent, I. C. C.-O. C. No. 37, filed on November 18, 1910, effective January 1, 1911, and in force throughout the month of December, 1911:

* * * * * * *

Page 142.

7 Live Stock—
8 Domestic Animals, Carloads, * * * * *

Horses or mules (Including Stallions or Jacks), when not exceeding twenty (20) animals are loaded in one car, per car, 20,000 lbs.* * *

Each additional horse, Mule, Pony or colt, loaded in same car in excess of 20 animals, will be charged for at weight of 1,000 lbs.

* * * * * * *

Extracts from Norfolk Southern Railroad Virginia Cities Freight Tariff No. 3, I. C. C. G. No. 400, filed on October 2, 1911, effective November 4, 1911, and in force throughout the month of December, 1911:

(25) Title Page.

* * * * * * *

Governed except as otherwise provided herein by Southern Classification No. 38, W. R. Powe's I. C. C. No. 15, supplements thereto and reissues thereof.

* * *

* * * * * * *

Page 28.

NORFOLK SOUTHERN RAILROAD STATIONS.

Table of Commodity Rates, in Cents per Hundred Pounds, Unless Otherwise Specified.

| Station No. | Between Groups 1 Norfolk, Va. and | Group No. | Live Stock, released, carload minimum 20,000 pounds per car |
|---|---|---|---|
| * | Norfolk Division* | * * | * * * |
| 35 | Main Line | * * | * * * |
| | * N. C. | 1 | 2150 |
| * | Hertford " | * | * * * |

* * * * * * *

Extracts from Southern Classification No. 38, W. R. Powe, Agent, I. C. C. No. 15, filed on June 18, 1910, and in force throughout month of December, 1911:

Page 61.

* * * * * * * *

LIVE STOCK, subject to the following rules, viz:

* * * * * * * *

## R. M. WOODWARD

TRANSPORTATION OF CARETAKERS IN CHARGE OF LIVE STOCK.

Free or reduced transportation shall not be issued for shippers or caretakers in charge of live stock shipments, whether carloads or less, and such shippers or caretakers shall pay full fare returning.

* * * * * * *

**Testimony of R. M. Woodward.**

R. M. WOODWARD, witness for the defendant, testified as follows:

I was the conductor in charge of the train in question. I took charge of it at the Berkley yard, sometimes called the Norfolk terminal. I did not see the plaintiff in the car. I did not know he was there until the wreck took place. I did not tell any one else to tell him to get in the car, and knew nothing of him. He paid me no fare. There was no passenger coach on the train, I had nothing but a caboose and did not see him in that. I took charge of the train in Norfolk and remained in (26) charge of it until the wreck took place.

CROSS EXAMINATION.

I had a waybill, but no bill of lading. I did not go down and look at the car and did not know anyone was in the car. We had handled live stock both ways, in charge of a man, or not in charge of a man. We are not compelled to have a man in charge. I did not know that Chapman was with me until the derailment.

RE-DIRECT EXAMINATION.

Nobody paid or offered to pay me any fare for his coming on that train.

There were other witnesses and other testimony offered as to the wreck and damages, but they are not set out here as they are not deemed material on this appeal.

## MOTION TO DIRECT A VERDICT.

At the close of all the evidence, the defendant moved the court to direct a verdict for the defendant, which motion was overruled, and the defendant excepted. This is the fourth exception.

### Prayers for Instruction.

The defendant then requested the court to charge the jury among other things as follows:

I.

The plaintiff contends that on the — day of ———— 19—, he entered into a contract with the Pennsylvania Railroad Company, at Jersey City, by which the Pennsylvania Railroad Company agreed with the plaintiff that, in consideration of $————, it would transport from Jersey City, in the State of New Jersey, to Hertford, in the State of North Carolina, ———— head of horses, and would furnish to the plaintiff free transportation for himself, as a caretaker, to accompany this shipment of stock.

The plaintiff further contends that with this shipment of stock it was necessary for the same to be moved over the line of the Pennsylvania railroad and connecting carriers to Berkley, in the State of Virginia, where it was delivered to the Norfolk Southern Railroad Company, the defendant.

The plaintiff further contends that on the 2d day of December, 1911, the Norfolk Southern Railroad Company, having received the carload of stock under the contract made on the —day of ———, 19—, with the Pennsylvania railroad, placed said car of stock in a freight train and undertook to carry the same from Berkley, in the State of Virginia, to Hertford, in the State of
(27) North Carolina.

That when the train in which the carload of stock was being carried reached Moyock, in the State of North Carolina, the said train was derailed.

The plaintiff further contends that, under and by virtue of his contract made with the Pennsylvania railroad, he was riding on this train of the Norfolk Southern railroad in the freight car in which the live stock

was being transported, and that when this car was derailed he was thrown down and injured.

The defendant contends, and has offered evidence to show, that at the time the stock in question was being transported from Jersey City, in the State of New Jersey, to Hertford, in the State of North Carolina, the Pennsylvania railroad and the Norfolk Southern railroad, and other intervening and connecting carriers, had duly filed and published with the Interstate Commerce Commission, and according to law, a tariff showing the rates and charges for the movement of freight between Jersey City, in the State of New Jersey and Hertford, in the State of North Carolina.

The defendant further contends, and the court charges you, that, if you believe the evidence you will find that the tariff so filed and published shows the rate of freight on stock between Jersey City, in the State of New Jersey, and Hertford, in the State of North Carolina, and shows that, as a part of the said tariff, it was stipulated that for that rate of freight no caretaker should be transported, but if a caretaker desired to go over the said road to accompany said stock, that such caretaker should pay the full and regular fare for such passage.

The court refused to so charge the jury, to which refusal the defendant excepted. This was the fifth exception.

II.

The defendant contends that, while it is true that the laws of the United States regulating Interstate Commerce authorize and permit a common carrier to give free transportation for caretakers, the court charges you that, as a matter of law, the Pennsylvania railroad could not by the issuance of its bill of lading undertake to contract to carry the plaintiff's carload of horses and plaintiff himself from Jersey City, in the State of New Jersey, to Hertford, in the State of North Carolina, at the price named for the carriage of the horses alone, and especially in view of the tariff which had been duly filed and published, showing that such transportation could not be given, or was not embraced.

The court refused to so charge the jury, to which refusal the defendant excepted. This was the sixth exception.

III.

The court, therefore, charges you, as a matter of law, that upon all the evidence in this case, the plaintiff's riding upon the said train of the defendant was in violation of the law and that plaintiff cannot recover, then you will answer the first issue, No.

The court refused to so charge the jury, to which refusal the defendant excepted. This was the seventh exception.

IV.

The court further charges you, as a matter of law, t,hat if you believe the evidence in this case, plaintiff was riding upon the train of defendant company in violation of the law of the United States, and under a contract made between plaintiff and the Pennsylvania railroad, which contract was void, being made in violation of the law, and, therefore, the law will not permit plaintiff to recover in an action of this kind, and you will answer the (28) first issue, no, and the second issue "none."

The court refused to so charge the jury, to which refusal the defendant excepted. This was the eighth exception.

V.

The court charges you that, if you should find that the plaintiff was riding upon the defendant's train upon a free pass or free ticket, enjoying the privileges as riding thereon as a mere gratuity, and not as a traveller, having paid no compensation for the privilege of riding, then the plaintiff could not recover, as he contracted under his contract that he would, himself, assume all liability for accident, and this woulr be true whether the accident was caused by the negligence of the defendant or not, and you will answer the first issue, No.

The court refused to so charge the jury, to which refusal the defendant excepted. This was the ninth exception.

VI.

If the jury find from the evidence that plaintiff was riding upon the train of the defendant without the knowledge or authority of the defendant, the jury will answer the first issue, No.

The court refused to so charge the jury, to which refusal the defendant excepted. This was the tenth exception.

VII.

If the jury find from the evidence that plaintiff was riding upon the train of the defendant, without any authority from the defendant, then the court charges you, as a matter of law, that the contract made between the plaintiff and the Pennsylvania railroad as set out in the bill of lading, would not be sufficient authority to justify plaintiff in attempting to ride the freight train of defendant, and the jury will answer the first issue, No.

The court refused to so charge the jury, to which refusal the defendant excepted. This was the eleventh exception.

VIII.

The court charges you, as a matter of law, that the conductor of a freight train would not have authority to permit or authorize plaintiff to ride upon the freight train in question, and even though the jury should find from the evidence that the conductor of the freight train knew, or had reasonable ground to believe, that plaintiff was riding upon the train in question, and should further find that he was riding thereon, in pursuance to a contract made with the Pennsylvania railroad, then the court charges you that this would not justify the plaintiff in attempting to ride upon the train of the defendant, and plaintiff would be riding thereon without legal authority, and you would answer the first issue, No.

C. M. BAIN,
W. M. BOND,
J. KENYON WILSON,
(29) Attorneys for Defendants.

The court refused to so charge the jury, to which refusal the defendant excepted. This was the twelfth exception.

**Charge to the Jury.**

The Court then charged the jury as follows:

Gentlemen of the Jury: The defendant in this action alleges that he made a contract with the Pennsylvania Railroad Company, on the first or second day of December, 1911, to transfer some horses, placed in a car to Norfolk and from there to Hertford over the Norfolk

Southern railroad. He alleges that it was a part of that contract that he was entitled to ride in the car, for the purpose of taking care of the horses, that by reason of this permission to ride in the car, for which he said he paid as a part of the compensation of the horses, he became a passenger of the railroad. That as he came down to Norfolk and on reaching Norfolk the car was transferred and accepted by the Norfolk Southern Railroad and transported to Hertford. That he was in the car as a passenger under this contract, and that in the night or early in the morning of the third of December the train to which the *train* was attached was partly derailed, and that by reason thereof he suffered physical injury, by which he says he sustained damage to the extent of $6,000.00.

(1) The defendant denies that he became a passenger rightfully on the car at the time of the derailment. That contention raises a question of law with which I will not trouble you.

I charge you, if you find from the facts in the testimony here that he made a contract with the Pennsylvania railroad to transport the horses and permit him to ride on the train and use the car to take care of the horses, he became thereby a passenger over that road. If you further find that the Pennsylvania railroad delivered the car to the Norfolk Southern and it was accepted by the *by* defendant, the Norfolk Southern railroad became liable to the same extent as the Pennsylvania railroad and theretofore became liable. (2).

To the foregoing portion of the charge between the figures *i* and 2, the defendant in apt time excepted. This was the defendant's thirteenth exception.

That presents you to the question whether or not he was injured while being in the car. It is in evidence, without contradiction, that the car was derailed, the rail spread, or by some means the wheels of the car were thrown from the tract. You heard the description, gentlemen.

There is evidence that the cross ties on which the rails were laid were rotten at the place at which the derailment took place.

The railroad owes to its passengers a very high degree of care to keep its roadbed and all of its engines, cars and appliances in safe condition for its passengers, and if it fails to do so and the passenger is injured he is entitled to recover damages. If you find from the testi-

mony that the car was derailed that would justify you (30) in finding that there was negligence. The derailment would not necessarily show that there was negligence, but you would be justified in finding the facts. In other words you could call upon the defendant to explain why the condition existed there. You are not however, called upon to find a verdict, in this case because there is positive evidence here. If you believe from the evidence that the ties were rotten to the extent and the manner described by the witnesses that would be negligence, and the railroad would be liable for such injury as any of the passengers sustained. If, however, you are not brought to that conclusion, why you answer this, No.

If you should answer this Yes, the next question is what is the amount of the damages? The law gives to plaintiff such damages as would compensate him for the injury sustained and in ascertaining that damage you take into consideration his physical condition at the time of sustaining the injury and his physical condition immediately after the injury was sustained. He says he was a well man at the time. He has testified to you as to his physical condition since the injury was sustained. He described to you the position in which he was when the derailment took place. He had a stallion, I think, and some other horses, and one was biting the other, and he was reaching over a plank or bar to separate the horses, and when the derailment took place by the sudden stopping of the train he was thrown over down on the floor and hit his head and fell, you remember that gentlemen, how he was injured. He also testified that he had since that time suffered physical pain and suffered with his back and leg, and that his urinary organ has been injured. He described to you in what manner they were affected. He says he did the business of training horses for Mr. White and received $40.00 a month, and when he was training horses, $100.00 a month. He tells you how long he has been in that business, and what his wages were. He says he is no longer able to perform that service which he had heretofore performed. He introduces Dr. McMullan, who saw the plaintiff a short time after his injury, and described the condition in which he found him. He gives you a scientific account of the structure of the human body and the effect upon it by giving it a jar, and how it would effect the nervous system, and how it would affect the urinary system of a man. He saw him several times, and gave his opinion as to his physical condition. Then he calls Dr. Sharp a colored doctor, who

says he saw him. Whether he was out in his automobile, and whether he was not carrying the horse for the purpose of serving mares, you heard his testimony about that. All of that testimony is to be considered by you.

The defendant calls Dr. Mann, who saw him seven hours after the injury. He was a physician for the railroad there, and saw him the next morning after the injury. He saw the defendant and took him to his office and made him comfortable and examined him, and said he found no bruises or abrasions on the body, did not find that he was shocked, his heart was normal and his pulse was normal, that he did not give him any medicine, but applied a counter-irritant to his back. But you heard Dr. Mann's testimony. Then Dr. Smith was called and you heard his testimony. Then you heard the other testimony. This is the main evidence. Now from this evidence you are to ask how much damage did he sustain, to what extent has his earning capacity been affected? And when you have ascertained that, what is the money value of that? The evidence is that he was forty-eight years old, and according to the mortality table he has an experience of thirty years and you may consider that table provided by the legislature. To aid you in ascertaining if he has sustained a permanent injury you may take into consideration his condition, to aid you in saying what damage he has sustained. He is also entitled (31) to recover damages for any physical suffering he has sustained, or may hereafter sustain, or any mental suffering immediately traceable or caused by this injury.

The defendant argues to you that the injury could not have been so serious because he has since that time, the next morning; put the horses back in the car, and a short time after that was driving in his automobile, and a short time after that carrying the horse around for the purpose for which the owner used it, therefore this is contradictory.

Taking the whole evidence you will ascertain what amount of money will compensate him. Not give him any damages by way of punishing the railroad. It is just a question of negligence. The compensation for the injury actually sustained, loss or capacity to earn money, mental and physical suffering. Of course there is no fixed standard to name the amount. That is left to the judgment of the twelve intelligent jurors. Of course, gentlemen, let the verdict be the real conclusion of your mind, whether the plaintiff is a colored man has nothing to do with it.

**Verdict.**

The jury answered the issues submitted to them as follows:

W. C. Chatman,
*vs.*
Norfolk Southern Railroad.

**Issues.**

1st. Was plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer, "Yes."

2nd. What damage, if any, is plaintiff entitled to recover? Answer, $1,550.00, (Fifteen hundred and fifty dollars).

**Motion for a New Trial.**

Upon the coming in of the verdict the defendant moved to set aside the same and for a new trial for committed errors on the trial, and for errors in the charge of the court as hereinbefore pointed out. Motion denied and defendant excepted.

This was the defendants fourteenth exception.

**Judgment Signed.**

(32) Judgment was entered as set out in the record in favor of the plaintiff, for the sum of fifteen hundred and fifty ($1,550) dollars and the cost of the action.

To the signing of this judgment the defendant in apt time excepted. This was the fifteenth exception.

To the foregoing action and rulings of the court and the entering up of the said judgment on the said verdict, the defendant by its counsel duly excepted as is hereinbefore set forth in exceptions Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15, and tenders this its bill of exceptions No. 1, which is signed, sealed, enrolled and ordered to be made a part of the record.

Bills of exception No. 1 to 14 inclusive, and assignment of error No. 1 to 7, inclusive, are hereby referred to, and made a part of this bill of exception, as fully as if the same were here specifically set forth.

The court does certify that the evidence hereinbefore set forth is a correct statement in narrative form of all the evidence adduced at the trial of this case, bearing upon the question presented by this appeal, and the charges set forth are all the court's charges to the jury in this case.

H. G. CONNER, Judge. (Seal)

## BILL OF EXCEPTION No. 2.

(33)

Be it remembered, that upon the trial of this case, and after the jury had been sworn and empanelled, to try the issues joined in this case, as is set out in bill of exception No. 1, which bill of exception is hereby referred to, and made a part hereof, as fully as if the same were specifically set forth, the defendant requested the court to submit the following isues to the jury.

1st. Was the plaintiff injured by the negligence of the defendant while lawfully riding on the defendant's train as a passenger, as alleged in the complaint.

2nd. What damages, if any, is the plaintiff entitled to recover for said injury.

3rd. Did the plaintiff assume the risks of injury in traveling upon defendant's train, and release the defendant therefrom.

To the submission of which isues the plaintiff objected, and the court sustained the objection of the plaintiff, and refused to submit the same, to which action and ruling of the court, in sustaining the objection of the plaintiff to the submission, and in refusing to submit the same to the jury, the defendant by its counsel, excepted, and tendered this, its bill of exception No. 2, which is signed, sealed, enrolled and ordered to be made part of the records.

H. G. CONNER, Judge. (Seal)

## BILL OF EXCEPTIONS No. 3.

(34)

Be it remembered, that upon the trial of this case, and after the jury had been sworn and empanelled to try the issues joined in this case, as is set out in bill of exception No. 1, which bill of exception is hereby referred to and made a part hereof, as fully as if the same were specifically set forth, the plaintiff requests the court to submit the following issues to the jury:

1st. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

2nd. What damages, if any, is the plaintiff entitled to recover?

To the submission of which issues the defendant objected and the court overruled the objection of the defendant, and submitted the issues as requested by the plaintiff to the jury, to which action and ruling of the court, in overruling the objection of the defendant to the submission of said issues, the defendant by its counsel, excepted, and tenders this its bill of exception No. 3, which is signed, sealed, enrolled and ordered to be made a part of the records.

H. G. CONNER, Judge. (Seal)

(35)

**BILL OF EXCEPTION No. 4.**

Be it remembered, that upon the trial of this cause and after the jury had been sworn and empanelled to try the issues joined therein, and the plaintiff to prove and sustain the issues on his part, having introduced and examined witnesses and having concluded his evidence as is set forth in bill of exception No. 1, which bill of exception is hereby referred to and made a part hereof as fully as if the same were specifically set forth, the defendant requested the court to take the case from the jury and direct a verdict for the defendant, as is set forth in said bill of exceptions No. 1 as the third exception. Which said motion the court overruled, to which action and overruling of the court the defendant by its counsel in apt time excepted, and tendered this its bill of exceptions No. 4, which is signed, sealed, enrolled and ordered to be made a part of the record.

H. G. CONNER, Judge. (Seal)

(36)

**BILL OF EXCEPTION No. 5.**

Be it remembered, that upon the trial of this case, and after the jury had been sworn , to try the issue joined in this case, and the plaintiff to prove and sustain the issue on his part, having introduced and examined witnesses, and the defendant to prove and sustain the issue on its part, having introduced and examined witnesses, the jury having heard the testimony in the case, which is set out in bill of exception No. 1, which bill of exception is hereby referred to and made a part hereof, as fully as if the same were specifically set forth.

The defendant requested the court to take the case from the jury and direct a verdict for the defendant, which motion the court overruled, to which action and ruling of the court, the defendant, by its counsel, excepted, and tenders this, its bill of exception No. 5, which is signed, sealed, enrolled and ordered to be made a part of the records.

H. G. CONNER, Judge. (Seal)

**BILL OF EXCEPTION No. 6, 7, 8, 9, 10, 11, 12 AND 13.**

(37)

Be it remembered, that upon the trial of this case, and after the jury had been sworn, to try the issues joined in this case, the plaintiff to prove and sustain the issue on his part having introduced and examined witnesses, and the defendant to prove and sustain on its part, having introduced and examined witnesses, the jury having heard the testimony in the case, which is set out in bill of exception No. 1, which bill of exception is hereby referred to and made a part hereof, as fully as if the same were specifically set forth, counsel for the defendant submitted to the court, and requested the court to charge the jury, as is fully set out in said bill of exceptions No. 1.

EXCEPTION No. 5.

To the refusal of the court to give defendant aforesaid prayer for instruction No. 1, as requested, counsel for defendant in apt time excepted, as is set forth in bill of exceptions No. 1 as the fifth exception, and tendered this, its bill of exceptions No. 6 and asked that it be allowed, signed and sealed, and it is allowed, signed and sealed accordingly.

EXCEPTION. No. 6.

To the refusal of the court to give defendant's aforesaid prayer for instruction No. II as requested, counsel for defendant in apt time excepted, as is set forth in bill of exceptions No. 1 as the sixth exception, and tendered this, its bill of exceptions No. 7 and asked that it be allowed, signed and sealed, and it is allowed, signed and sealed accordingly.

EXCEPTION No. 7.

(38)

To the refusal of the court to give defendant's aforesaid prayer for instruction No. III, as requested, coun-

sel for defendant in apt time excepted, as is set forth in bill of exceptions No. 1, as the seventh exception, and tendered this, its bill of exceptions No. 8 and asked that it be allowed, signed and sealed, and it is allowed, signed and sealed accordingly.

EXCEPTION No. 8.

To the refusal of the court to give defendant's aforesaid prayer for instruction No. IV, as requested, counsel for defendant in apt time excepted, as is set forth in bill of exceptions No. 1, as the eighth exception, and tendered this, its bill of exceptions No. 9 and asked that it be allowed, signed and sealed, and it is allowed, sealed and signed accordingly.

EXCEPTION No. 9.

To the refusal of the court to give defendant's aforesaid prayer for instruction V, as requested, counsel for defendant in apt time excepted, as is set forth in bill of exceptions No. 1 as the ninth exception, and tendered this, its bill of exceptions No. 10 and asked that it be allowed, signed and sealed and it is allowed, signed and sealed accordingly.

EXCEPTION No. 10.

To the refusal of the court to give defendant's aforesaid prayer for instruction No. VI, as requested, counsel for defendant in apt time excepted, as is set forth in bill of exceptions No. 1 as the tenth exception, and tendered this, its bill of exceptions No. 11 and asked that it be allowed, signed and sealed, and it is allowed, signed and sealed accordngly.

EXCEPTION No. 11.

To the refusal of the court to give defendant's aforesaid prayer for instruction No. VII, as requested, counsel for defendant in apt time excepted, as is set forth in bill of exceptions No. 1 as the eleventh exception, and (39) tendered this, its bill of exceptions No. 12 and asked that it be allowed, signed and sealed, and it is allowed, signed and sealed accordingly.

EXCEPTION No. 12.

To the refusal of the court to give defendant's afore-

said prayer for instruction No. VIII, as requested, counsel for defendant in apt time excepted, as is set forth in bill of exceptions No. 1 as the twelfth exception, and tendered this, its bill of exceptions No. 13 and asked that it be allowed, signed and sealed, and it is allowed, signed and sealed accordingly.

H. G. CONNER, Judge. (Seal)

## BILL OF EXCEPTION No. 14.

(40) Be it remembered, that upon the trial of this case, and after the jury had been sworn to try the issue joined in this case, and the plaintiff to prove and sustain the issue on his part, having introduced and examined witnesses, and the defendant to prove and sustain the issue on its part, having introduced and examined witnesses, the jury having heard the testimony in the case, which is set out in bill of exception No. 1, which bill of exception is hereby referred to and made a part hereof, as fully as if the same were specifically set forth. Wherepon the court then proceeded to charge the jury, and in the course of the charge to the jury, the court instructed the jury as follows:

The defendant denies that he became a passenger rightfully on the car at the time of the derailment. That contention raises a question of law, with which I will not trouble you. I charge you that if you find from the facts in the testimony here that he made a contract with the Pennsylvania railroad to transport the horses and permit him to ride on the train, and use the car to take care of the horses, he became thereby a passenger over that road; then if you further find that the Pennsylvania railroad then delivered the car to the Norfolk Southern Railroad, and it was accepted by them, the Norfolk Southern railroad became liable to the same extent as the Pennsylvania railroad had theretofore become liable.

To which said portion of the charge to the jury the defendant objected, but the court overruled the objection of the defendant, and delivered the said portion of the charge to the jury, to which action and ruling of the court, in overruling the objection of the defendant, and in delivering the said portion of the charge to the jury, the defendant by its counsel excepted, and tenders this its bill of exception 14, which is signed, sealed, enrolled and (41) ordered to be made a part of the records.

H. G. CONNER, Judge. (Seal)

## ASSIGNMENT OF ERRORS.

(42)

(Filed March 23, 1914.)

The defendant in this case, in connection with its petition for a writ of error, makes the following assignment of errors, which occurred upon the trial of this case:

FIRST ASSIGNMENT OF ERROR.

The court erred in refusing to grant the defendant's request that the court take the case from the jury, and direct a verdict for the defendant, which is set out in bill of exception No. 4 and 5, which bill of exception is hereby referred to and *and* made a part hereof, as fully as if the same were here specifically set forth, for the following reasons:

1. Plaintiff was not a passenger.

The evidence as introduced by the plaintiff shows that he had no ticket for passage on the train, and paid nothing extra for the carriage of himself as passenger, having only paid $55.00 for freight for the horses, which as shown by the bill of lading introduced in evidence at the trial of the case, was shown to be a reduced rate, upon the limited valuation of the horses. The only paper which he obtained, was given him by the agent of the Pennsylvania Railroad, which shown on its face, was only a receipt for the bill of lading, and he obtained no other paper from anyone after getting to Norfolk, and obtained no ticket for the carriage of himself over the lines of the Norfolk Southern Railroad.

2. Plaintiff released defendant from liability for injury sustained by him.

If it were to be construed from the evidence that the plaintiff was entitled to ride upon the train from the paper, which he claimed was given him to travel on, then the plaintiff was a gratuitous passenger, and the contract (43) among other things contained a release which was duly signed by the said W. C. Chatman, plaintiff, in words and figures as follows:

"In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers, named in the within contract, without charge, other than

the sum paid, or to be paid for the carriage upon said freight train all the live stock mentioned in said contract, all of which live stock ——— in charge, the undersigned do hereby voluntarily assume all risk of accident or damage to ——— person or property, and do hereby release and discharge the said carrier or carriers from every and all claims for liability and damage, of every kind, nature and description, for or on account of, any personal injury or damage of any kind, sustained by the undersigned, so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employees or otherwise."

This defendant says that this said contact was valid in law, and binding upon the plaintiff, and it specially set up and pleaded same, in discharge of the cause of action stated in the complaint. That as the shipment was carried at a reduced rate, there was no consideration for the carriage of the plaintiff, and he was therefore a gratuitous passenger, if a passenger at all, and the release was valid as to a gratuitous passenger.

3. Plaintiff was riding in violation of law.

That upon the evidence in the case, it was shown from the tariffs filed with the Interstate Commerce Commission and according to law which by tariffs show the rates and charges for the movement of freight between Jersey City, in the State of New Jersey, and Hertford, in the State of North Carolina, and as a part of said tariff it was stipulated that for that rate of freight, no caretaker should be transported, but if a caretaker desired to go over the said road, and accompany the stock, such caretaker should pay the full and regular fare for such passage.

(44) That as the tariff set forth that no caretaker should be carried with the stock, unless he paid the full and regular fare for passage, the contract made between the plaintiff and the Pennsylvania Railroad was void, same being made in violation of the law. Therefore as the said contract was void, the plaintiff could not recover in an action based upon a void contract.

4. Plaintiff was upon train without authority of defendant.

The plaintiff was upon the train with any authority from the defendant, and the Pennsylvania Railroad Company had no authority to authorize the plaintiff to at-

tempt to ride upon freight train of the defendant, and no conductor of a freight train or other servant of the defendant had authority to permit or authorize the plaintiff to ride upon the freight train in question.

SECOND ASSIGNMENT OF ERRORS.

The court erred in refusing to submit to the jury the issues as offered by the defendant, which are set out in bill of exception No. 2, which bill of exception is hereby referred to, and made a part hereof, as fully as if the same were here specifically set forth, for the reasons, that the same correctly stated the issues which should have been submitted under the evidence as introduced in this case.

THIRD ASSIGNMENT OF ERRORS.

The court erred in submitting the issues as tendered by the plaintiff in this case, which are set forth in bill of exception No. 3, which bill of exception is hereby referred to, and made a part hereof, as fully as if the same were here specifically set forth, for the reason that under the issues as submitted to the jury, the jury couldn't find that the plaintiff has assumed the risks, nor were the jury under these issues allowed to determine whether the plaintiff was a passenger, nor were the jury allowed to determine under the issues submitted whether the plaintiff had released the defendant from liability for any injuries sustained.

(45) FOURTH ASSIGNMENT OF ERROR.

The court erred in refusing to grant the charges as requested by the defendant, which is set forth in bill of exception No. 6 to 13, which bill of exceptions is hereby referred to and made a part hereof, as fully as if the same were here specifically set forth, for the reasons that the charges as submitted by this defendant correctly stated the law, that the plaintiff was riding upon the train in violation of the law; while the court's charge incorrectly stated that the plaintiff was a passenger upon the train.

FIFTH ASSIGNMENT OF ERROR.

The court erred in delivering to the jury that portion of its charge, which is set forth in bill of exception

No. 14, which bill of exception is hereby referred to, and made a part hereof, as fully as if the same were hereby specifically set forth, for the reasons that the court should have directed a verdict for the defendant, and from the evidence as introduced the court should have held that the plaintiff was not a passenger upon the train of the defendant.

SIXTH ASSIGNMENT OF ERRORS.

That the court erred in refusing to grant defendant's motion, to set aside the verdict and grant a new trial, and for errors in the charge, as is set forth in defendant's bill of exceptions No. 1, as the fourteenth exception, for the reasons set forth in the preceding assignment of errors.

SEVENTH ASSIGNMENT OF ERRORS.

That the court erred in signing and entering judgment as set out in record in favor of the plaintiff, which error is pointed out in defendant's bill of exceptions No. 1, as the fifteenth exception, for the reasons set forth in the preceding assignments of errors.

(46) Wherefore the said Norfolk Southern Railroad Company, the plaintiff in error, prays that the judgment of the District Court of the United States for the Eastern District of North Carolina be reversed, and that the said District Court be directed to enter judgment for it, the said plaintiff in error, or to grant it a new trial of said cause, according to its rights in the premises.

NORFOLK SOUTHERN RAILROAD CO.,

By C. M. BAIN,
J. KENYON WILSON,
Attorneys.

## ORDER DESIGNATING PORTIONS OF RECORD.

(47) Filed April 30, 1914.

ORDER DESIGNATING PORTIONS OF RECORD TO BE SENT TO THE CIRCUIT COURT OF APPEALS.

The court hereby designates the following portions of the record and proof to be printed in the transcript

of the record for use in the Circuit Court of Appeals, to-wit:

The summons, sheriff's return, complaint, order of removal, answer, reply, joining of issues empaneling of jury, verdict, judgment, bill of exceptions order allowing bill of exceptions assignment of errors and this order.

H. G. CONNOR,
Judge.

**STIPULATION TO MAKE UP RECORD AND PRINT UNDER RULE 23.**

(48) Filed April 20, 1914.

We, the undersigned attorneys, representing the parties to the above entitled cause do hereby stipulate and agree to be governed by the terms of rule 23 of the United States Circuit Court of Appeals for the Fourth Circuit, in regard to printing the record on appeal in this cause.

This the 20 day of April, 1914.

J. KENYON WILSON,
Attorneys for the Ptff.
CHAS. WHEDBEE,
P. W. McMULLAN,
Attorneys for the Defendant.

(49)

**MEMORANDUM OF PAPERS FILED AND CERTIFIED CIRCUIT COURT OF APPEALS, AS PROVIDED BY SECTION 7, RULE 14.**

(1) Petition for writ of error filed Mch. 23, 1914.
(2) Writ of error granted April 11, 1914.
(3) Writ of error issued April 11, 1914.
(4) Copy of writ of error lodged for adverse party 12 day of April, 1914.
(5) Appeal bond, dated April 10, 1914.
Penalty $150.00.
Obligor: United States Fidelity and Guaranty Company, conditioned for costs.
(6) Citation, dated April 11, 1914.
Waiver of service, dated April 24, 1914.

(50)

## CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Eastern District of North Carolina.

I, Alex. L. Blow, clerk United States District Court, for the Eastern District of North Carolina, do hereby certify that the foregoing fifty pages present a true, full and correct copy of the proceedings had, and orders entered, in that certain cause pending in said court, wherein W. C. Chatman is plaintiff, and Norfolk-Southern Railroad Company is defendant, as per order of the district judge, designating portions of the record and proofs to be included in the transcript, all of which, together with the petition for writ of error, order granting writ of error, writ of error, appeal bond, citation and waiver of service of citation, the original of which documents are certified under separate cover, by virtue of section 7, rule 14, of the Rules of United States Circuit Court of Appeals for the Fourth Circuit, constitute the entire transcript of the proceedings in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the court-house in Elizabeth City, State of North Carolina, this 22 day of April, 1914.

ALEX. L. BLOW,
Clerk.
By H. T. GREENLEAF, JR.,
Deputy Clerk.

(Seal of Court.)

(46) On the same day, to-wit, May 9, 1914, original petition for writ of error, order allowing writ of error, writ of error, writ of error bond and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of C. M. Bain and J. Kenyon Wilson, is entered for the plaintiff in error.

May 12, 1914, the appearance of Charles Whedbee and P. W. McMullan, is entered for the defendant in error.

June 1, 1914, twenty-five copies of the printed record are filed.

November 17, 1914 (November Term, 1914), cause came on to be heard before Pritchard, Knapp and Woods, Circuit Judges, and is argued by counsel and submitted.

(48) **OPINION.**

Filed February 18, 1915.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

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No. 1283.

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NORFOLK SOUTHERN RAILROAD COMPANY,
Plaintiff in Error,

*versus*

W. C. CHATMAN, Defendant in Error.

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In Error to the District Court of the United States for the Eastern District of North Carolina, at Elizabeth City.

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(Argued Nov. 17, 1914. Decided Feb. 18, 1915.

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Before PRITCHARD, KNAPP and WOODS, Circuit Judges.

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C. M. BAIN and J. KENYON WILSON (W. D. RODMAN on brief) for plaintiff in error, and P. W. MCMULLAN and CHARLES WHEDBEE for defendant in error.

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PRITCHARD, Circuit Judge:

The plaintiff in error will be hereinafter referred to as defendant, and defendant in error as plaintiff, such

being the respective positions the parties occupied in (48) the court below.

In the early part of December, 1911, plaintiff delivered to the Pennsylvania Railroad Company, at Jersey City, New Jersey, a car-load of horses, to be transported over its lines and thence to Hertford, North Carolina, on the Norfolk Southern Railroad. About five o'clock in the afternoon, after the horses were loaded, the man who had the horses loaded for the Pennsylvania Railroad Company delivered to the plaintiff a paper in the following language:

Pennsylvania Railroad Company,
Coupon to Uniform Live Stock Contract No. 872,
120 Jersey City Station, Dec. 1st, 1911.

W. C. Chatman delivered to the Pennsylvania Railroad Company (subject to all the conditions of the Uniform Live Stock Contract, executed as of even date herewith and now in the possession of the said company, of which this coupon is part) live stock of the kind and number, and consigned and destined as follows:

17 Consigned W. C. Chatman,
Destination Pt. Norfolk, Va.
For Hartford, N. C.
one chartered car.

Number and description of Stock containing (shipper's load and count) nine (9) horses and (1) stud horse and one (1) colt. Released to a valuation of $100.00 each, watered & fed at 12 noon P. M.

W. C. Chatman, man in charge.
Weight subject to correction.....
Advances $.....
Car Nos. and Initials, Penna. Co. 581461.
Witness his hand and seal the day and year above written.

(Said shipper hereby states that the said animals (49) tendered to the carrier for shipment are not affected with glanders.)

W. C. CHATMAN, Shipper. (Seal)

Attest:
E. BUTLER,
per M. COMPANY'S AGENT.

After receiving the foregoing paper the plaintiff got on the car with the horses as caretaker at the direction of the Agent of the Company and came down to Cape Charles, Virginia, and thence across on a barge, still remaining in the car, to Norfolk, where the car was carried up to the stock yards. The car was delivered to the defendant, the Norfolk Southern Railroad, and hauled to a point near Moyock in the State of North Carolina, when the car in which plaintiff and the horses were riding was derailed on account of the defective condition of the track, rotten ties, etc., and the plaintiff was injured and greatly damaged.

The defendant, for the purposes of this appeal, admits the derailment and the injury and admits the plaintiff's right to recover judgment set out in the record, unless it can be shown that plaintiff was riding upon said train in violation of the law regulating interstate commerce, or that plaintiff was riding on the train without the authority of the defendant, and was a trespasser, or unless it can show that the plaintiff had assumed all risks of said transportation and released the defendant from any liability for neglect of any kind.

The defendant requested the court to submit the following issues to the jury:

1st. Was the plaintiff injured by the negligence of the defendant while lawfully riding on the defendant's train as a passenger, as alleged in the complaint?

2nd. What damages, if any, is the plaintiff entitled to recover for said injury?

(50) 3rd. Did the plaintiff assume the risks of injury in traveling upon defendant's train and release defendant therefrom?

The court declined to submit these issues, whereupon the plaintiff tendered the following issues which were submitted:

1st. Was plaintiff injured by the negligence of the defendant as alleged in the complaint?

2nd. What damage, if any, is plaintiff entitled to recover?

The jury answered both issues in favor of the plaintiff, and fixed the damages at $1,550.00, and judgment was entered accordingly, to which judgment defendant excepted, and the case comes here on writ of error.

It is insisted by counsel for defendant that it is not liable to plaintiff for damages in that plaintiff's contract with the Pennsylvania Railroad is in violation of Section 1 of what is known as the Act to Regulate Commerce; and, therefore, void; that the common or pass upon which plaintiff was transported was a gratuity and that he was not in any sense a passenger for hire. It is further insisted that under these circumstances the company did not owe the plaintiff the duty to exercise the care necessary for his protection from personal injury that it would have had he been a passenger for hire. Thus it will be seen that the principal question in this controversy is within a narrow compass.

Counsel for plaintiff insists that the transportation issued was for a valuable consideration; that it formed a material part of the contract with the Pennsylvania Railroad under which it agreed to ship the live-stock in question.

The memorandum in the right-hand corner of the caption, which is as follow, clearly indicates that it was the intention of the parties to the contract that the live-
(51) stock should be watered and fed regularly by the plaintiff, who was designated as the "man in charge:"

F. D. 2660.

Pennsylvania Railroad Company.

No. 872.

Uniform Live Stock Contract.

120 Jersey City Station, Dec. 1st, 1911.

This Agreement, made this the 1st day of December, 1911, by and between the Pennsylvania Railroad Company, hereinafter called carrier, and W. C. Chatman, hereinafter called shipper.

Witnesseth, That the said shipper has delivered to the said carrier live stock of the kind and number, and consigned and destined by said shipper, as follows:

| Consignee, Destination, etc. | Number and description of Stock and Count; Weight, Subject to Correction; Shipper's Load. |
|---|---|
| W. C. Chatman, Port Norfolk, for Hertford, N. C. c/o E. S. D. | One chartered car containing 9 horses, 1 stud, and one (1) colt. Released to a valuation of $100.00 each. Watered and fed by shipper at 12 noon, P. M. W. C. Chatman, man in charge. |

Advance charges $.....
Car Nos. and initials Penna. No. 581461.

The contract also contained the following provision:

"That said shipper shall see that all donors and open-
(52) ings in said car or cars are at all times so closed and fastened as to prevent the escape therefrom of any of the said stock and said carrier or any connecting carrier shall not be liable on account of the escape of any of the said stock from said car or cars."

This provision placed upon the shipper the duty of keeping the openings closed so as to prevent the escape from the car of any stock shipped, and also contained an exemption from any liability that might occur as a result of failure on the part of the shipper to take the necessary steps to prevent the happening of the things enumerated herein. This, read in connection with the caption, clearly shows that it was to the interest of the carrier from a pecuniary standpoint to have a caretaker in constant attendance from the time the car was loaded and started to its destination until its arrival and the shipment was delivered to the consignee. It would be unreasonable to say that this of itself did not constitute a consideration for the transportation issued to the caretaker.

It should also be borne in mind that Section 4386, U. S. Compiled Statute, 1901, prohibits the confinement of cattle, sheep or other animals transported from one State to another for a longer period than twenty-eight consecutive hours without unloading the same for rest, water and feeding, unless prevented by storm or other accidental causes, hence the importance of having a caretaker in charge of each shipment of live stock.

The schedule filed with the Interstate Commerce Commission by the company issuing this bill of lading, among other things, contained the following as part of the rule which relates to live stock shipments:

"Free and reduced transportation shall not be issued to shipper or caretaker in charge of live stock shipments whether carloads or less, and such shippers or caretakers shall pay full fare returning."

Section 1 of the Act to Regulate Commerce, to (53) which reference has hereinbefore been made, among other things provides that—

"No common carrier, subject to the provision of this Act, from January 1, 1907, shall directly or indirectly issue or give any free interstate tickets, free passes or free transportation for passengers * * * * except to necessary caretakers of live stock, poultry, etc."

It is obvious from reading the foregoing that if the transportation issued on this occasion be a pass, as such it is specifically exempted by Section 1 of the Act.

When we consider this provision of the Act it clearly appears that the shipper is not prohibited to issue transportation to caretakers while accompanying stock from point of shipment to destination, and while the first portion of the schedule provides that it shall be unlawful to give free passes or transportation, this proviso is limited by the concluding paragraph, to-wit: "Then such shippers or caretakers shall pay full fare returning." In other words, this clearly shows that the transportation company recognized the fact that it was its duty to issue transportation to shippers or caretakers while accompanying the stock in consideration of the services thus rendered, while on the other hand, the proviso indicates that the transportation company there-

by sought to relieve itself from issuing free transportation to shippers or caretakers returning.

If it had been the purpose of the transportation company to refuse transportation to shippers or caretakers while accompanying shipments of live stock, it would have been unnecessary to have added a proviso as to the return trip. Therefore, we are of opinion that this provision was intended to mean that the transportation granted to the shipper or caretaker while accompanying the stock should not be free and gratutious, and that while making such trip the caretaker or shipper was to be considered as a passenger for hire, but that (54) no free transportation was to be issued to such shipper or caretaker for the return trip. Therefore, in view of this provision, it cannot be reasonably insisted that the transportation issued to plaintiff on this occasion was free or gratuitous.

The Supreme Court of the United States in the case of *New York Central Railroad Company* vs. *Lockwood*, 17 Wallace, 357, in passing on this point said: "A person traveling on a pass * * * for the purpose of taking care of stock on a train is a passenger for hire."

The following is contained in Cyclopedia of Law and Procedure, Vol. 6, page 544:

"Persons are, however, frequently transported on so-called passes who are not in fact gratuitous passengers, because the right to ride without payment of special compensation therefor is given in part consideration of payment which is principally for other services. Thus one who travels on a drover's pass, which is issued in connection with the transportation of live stock for hire, is not a free passenger, but a passenger for compensation. And those who are carried on freight trains to look after live stock which is being transported, and as an incident to such transportation, are entitled to protection as passengers."

This rule is also announced in the cases of *Kirkendall* vs. *Union Pacific Railroad Company*, 200 Fed., 197; *B. & Q. R. R.* vs. *Williams*, 200 Fed., 207.

On the reverse side of the sheet on which this contract is written appears what purports to be a provision relieving the carrier from liability for injuries resulting from the carrier's neglect or otherwise. In the case

to which we have referred it was held that such provision was void.

The case of *Hucksters* vs. *St. Louis & H. Railroad Co.*, 166 Mo., 330, is to the same effect.

The Supreme Court of Indiana in the case of *Louisville Nashville Railroad Company* vs. *Taylor*, 126 Ind., 126, said:

(55) "A stipulation that the carrier shall not be bound to the exercise of care and diligence is in effect an agreement to absolve him from one of the essential duties of the employment and it would be subversive of the very object of the law to permit the carrier to exempt itself from liability by a stipulation in his contract with the passenger that the latter should take the risk to the neglect of the carrier or of his servants. The law would not allow the carrier thus to abandon his obligation to the public, and hence all stipulations which amount to a denial or repudiation of duties which are of the very essence of his employment will be regarded as unreasonable, contrary to public policy and void."

However, it is insisted by counsel for defendant that the Supreme Court of the United States in the case of *Charleston & W. C. R. Co.* vs. *Thompson*, 234 U. S., 576, had decided this question in favor of defendant's contention.

That case is easily distinguished from the case at bar. There a free pass was issued to a member of the family of an employe without any consideration whatsoever. The Supreme Court held that the pass issued to a member of the family of an employe is free under the provision of the statute which authorized it to be issued, and that "the stipulation contained in it is excepted, and the stipulations contained in it and on which it is excepted, including one exempting the company from liability in case of injury, are valid." The Supreme Court based its opinion upon the theory that the pass was free and gratuitous, and that in no sense of the word could one riding on such a pass be deemed a passenger for hire.

In the case at bar, as we have already stated, the transportation was given in consideration of an agreement on the part of the caretaker that the carrier should not be bound to exercise such care and diligence as

would otherwise have been incumbent upon it in order to secure the safe transportation of live stock.

By this agreement the carrier relieved itself of the (56) obligation which it owed the public, and it would be manifestly unjust under such circumstances to hold that the stipulation exempting the company from liability is valid, and that the defendant is relieved from liability for the injury which plaintiff sustained.

For the reason stated, we think the stipulation in this instance, which undertakes to relieve the carrier from liability for injuries resulting fom the carrier's negligence and otherwise, is void.

It being shown that there was a derailment, under the laws of North Carolina the presumption is that the same was occasioned by the neglect of the railroads. In fact, this proposition does not seem to be seriously controverted by the defendant.

As we have stated, the learned judge who heard this case refused to submit the issues that were tendered by the defendant, and in lieu thereof submitted what we conceive to be the proper issues in view of the evidence.

Being of opinion that the case was fairly and impartially tried, the judgment of the lower court is

*Affirmed.*

**JUDGMENT.**

(57)

Filed and entered February 20, 1915.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

No. 1283.

Norfolk Southern Railroad Company, Plaintiff in Error,

*vs.*

W. C. Chatman, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of North Carolina.

This cause came on to be heard on the transcript of

the record from the District Court of the United States for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby affirmed, with costs.

C. A. WOODS,
February 20, 1915. U. S. Circuit Judge.

**ORDER STAYING MANDATE.**

Filed and entered March 17, 1915.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

No. 1283.

Norfolk Southern Railroad Company, Plaintiff in Error,
*vs.*
W. C. Chatman, Defendant in Error.

Error to the District Court of the United States for the Eastern District of North Carolina, at Elizabeth City.

Upon the application of the plaintiff in error, by C. M. Bain, its counsel, and for good cause shown,

It is ordered that the mandate of this Court in the above case, be, and the same is hereby stayed pending the petition of the plaintiff in error for a rehearing, provided said petition is presented by March 22. 1915.

MARTIN A. KNAPP,
March 17, 1915. U. S. Circuit Judge.

**PETITION OF PLAINTIFF IN ERROR FOR A REHEARING.**
(58)

Presented March 19, 1915.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

No. 1283.

Norfolk Southern Railroad Company, Plaintiff-in-Error,

*v.*

W. C. Chatman, Defendant-in-Error.

PLAINTIFF-IN-ERROR'S PETITION FOR REHEARING.

Comes now the Norfolk Southern Railroad Company, plaintiff-in-error in the above entitled cause, and most respectfully petitions this Honorable Court for a rehearing of said cause, and having fully examined the opinion of this Honorable Court, we think that with propriety, we may ask the Court to consider whether this case be not one in which it will be proper to grant a rehearing to the plaintiff-in-error, and as grounds for such rehearing assign the following:

I.

The opinion is in error in that it holds that it was to the interest of the plaintiff-in-error from a pecuniary standpoint to have a caretaker in attendance from the time it was loaded until delivered to the consignee, and held that this of itself constituted a consideration for (59) the transportation issued to the caretaker.

II.

The Court erred in holding that under the provisions of the tariff and the exceptions of paragraph 1 of the Interstate Commerce Act that it was the duty to issue transportation to shippers and caretakers while accompanying the stock in consideration of the services rendered.

This violates the provision of Section 6 of the Interstate Commerce Act, the ruling of the Interstate Commerce Commission, and is not in harmony with the ruling laid down by the United States Supreme Court in the cases of *Louisville & N. R. Co.* v. *Mottley*, 219 U. S., 467; 55 L. Ed., 297; and *Chicago etc. R. Co.* v. *United States*, 219 U. S., 486; 55 L. Ed., 305.

III.

In distinguishing the case from the case of *Charleston etc. R. Co.* v. *Thompson*, 234 U. S., 576; the Court did not take into consideration that part of the opinion in the Thompson case reading as follows:

"The Railroad was under no obligation to issue the pass. It may be doubted whether it could have entered into one, for then the services would be the consideration for the duty and the pass, and by Section 6 it was forbidden to charge 'a greater or less or different compensation' for the transportation of passengers from that in its published rates."

IV.

That the opinion hods that the transportation was given in consideration of an agreement on the part of the caretaker that the carrier should not be bound to exercise such care and diligence as would otherwise have been incumbent upon it in order to secure the safe transpor-
(60) tation of the stock. This would be an illegal consideration. The carrier could not accept as consideration for the transportation of passengers or property anything except money.

V.

That the Court holds as a matter of law that Chatman was a passenger. It was a matter of fact, at least, under the evidence for the Jury to have determined, whether Chatman was a passenger for hire, or travelling

free, or riding unlawfully. The Trial Court held that Chatman was a passenger for hire, and this Honorable Court also holds the same, stating that the consideration was the services rendered. This was not provided for in the schedules, and if it was to be contended that the consideration was included in the amount paid for the transportation of the stock, that was a matter for the jury, and under the issues submitted by the Court and the Court's charge, the jury were not permitted to say whether there was any consideration for the transportation of Chatman. The tariffs cannot imply what privileges it will give to shippers, but must *specifically set forth what privileges will be granted.*

We desire to call attention to the Court that the opinion holds that a carrier can accept as consideration for transportation of passengers services rendered in connection with shipments. This of itself would open the door wide to fraud. The services of each person accompanying shipments or performing work would not be the same. They would not be on the same plane. Transportation must be paid for in money, which has a certain value, known to all and not in commodities, services or otherwise than in money, in order that all may be treated alike.

(61) Therefore your petitioner prays that an order may be made for a rehearing of the argument in this case on a day to be appointed by this Court, and upon such points as this Honorable Court may direct.

NORFOLK SOUTHERN RAILROAD COMPANY,
By W. B. RODMAN,
C. M. BAIN,
J. KENYON WILSON,
Its Attorneys.

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**CERTIFICATE OF COUNSEL.**

I, C. M. BAIN, one of the Attorneys for the above named plaintiff-in-error, The Norfolk Southern Railroad Company, hereby certify that in my opinion, the above petition for rehearing, and the separate grounds therefor, are meritorious and well founded in point of law, and that this petition for rehearing is not interposed for delay.

C. M. BAIN,
Attorney for Plaintiff-in-Error.

## MEMORANDUM ON PETITION FOR REHEARING.

We desire to make one or two suggestions in support of the petition for rehearing of this case.

By holding that the consideration for the transportation of Chatman was services rendered, or the release contained in the live stock contract, or implying that the consideration was included in the amount paid for the transportation of the stock, the Court allows Chatman to recover on an illegal contract. We will not discuss the liability under an illegal contract as that point was fully covered by original brief filed in this cause.

The question is, can the carrier accept anything ex-
(62) cept money in consideration for the transportation of passengers or property?

Under Section 6 of the Interstate Commerce Act the carriers must show

> "all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges or the value of service rendered to the passenger, shipper or consignee. * * * * Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariff than the rates, fares and charges which are specified in the tariff filed and in effect at the time, * * nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

By Conference Ruling 207, the Interstate Commerce Commission held:

> "Nothing but money can be lawfully received or accepted in payment for transportation subject to the Act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates and fares in effect at the time, precludes the acceptance of ser-

vices, property, or other payment in lieu of the amount of money specified in the published schedules."

The Supreme Court of the United States in the case of *Louisville & Nashville R. Co.* vs. *Mottley*, 219 U. S., (63) 467; 55 L. Ed., 297; held that a carrier cannot accept as consideration for the transportation of passengers or property anything but money, so as to give all the same opportunity and have the equal benefit.

The Court in that case held:

"The words of the Act, therefore, must be taken to mean that a carrier engaged in interstate commerce cannot charge, collect or receive for transportation on its road anything but money."

In that case it was argued that the railroad would receive a valuable consideration for each pass issued. But the Court said:

"This view is more plausible than sound, and does not meet the difficulty. Suffice it to say, in this case that such passes, when issued, would be illegal under the Act of Congress, by reason of their not being paid for in money according to the company's schedules of rates."

In the case of *Chicago etc. R. Co.* vs. *United States*, 219 U. S., 486; 55 L. Ed., 305; it was held that a carrier could not accept advertising in payment of transportation in interstate commerce. As was said in that case:

"The facts in the present case show how easily, under any other rule, the Act can be evaded and the object of Congress entirely defeated. The legislative departmentt intended that all who obtain transportation on interstate lines should be treated alike in the matter of rates, and that all who avail themselves of the services of the company (with certain specified exceptions) should be on a plane of equality Those ends cannot be met otherwise than by requiring transportation to be paid in money, which has a certain value, known to all, and not in commodities, or *services or otherwise than in money.*" (Italics ours.)

(64) It cannot be said that by implication the fare of the caretaker included in the charge for the stock, for

1st. This would be in violation of Section 6 of the Interstate Commerce Act. That Section, as heretofore stated, requires the carrier to expressly *specify* in the tariff all privileges granted in the transportation of passengers or property.

2nd. Such a construction would not treat all shippers alike. There are a number of cases where no caretaker accompanies the stock. In fact a caretaker does not accompany the stock in 90% of the shipments.

As it was not expressly provided in the tariff that caretakers should accompany the stock free; for Chatman to have been legally upon the train he was there solely by virtue of the provision of Section 1 of the Act. If he was there by virtue of Section 1 of the Act, he would come within the ruling of the Thompson case.

We think the Court erred in its distinction between the Thompson case and this case.

That case expressly held that a carrier must collect the charges shown in the tariff, or issue free passes only to those specified in the Act, holding that all passes issued to the excepted classes were free.

The opinion in our case says:

> "That it was the carrier's duty to issue transportation to shippers or caretakers while accompanying the stock in consideration of the services rendered."

In the Thompson case the point was raised that the transportation was issued upon consideration of the services of the employee. The Court in reply said:

> "The railroad was under no obligation to issue the pass. It may be doubted whether it could have entered into one, for then the services would be in (65) consideration for the duty and the pass and by Section 6, it was forbidden to 'charge a greater or less or different compensation' for the transportation of passengers from that shown in its published rates."

By reference to the Thompson case we also find the following language:

> "After the writ of error was taken it modified its

statement so as to say that the jury might infer that the pass was issued for value. But no such issue was before the jury, as the defense was excluded altogether, and apart from other objections we are of the opinion that the change does not help the decision."

The above quotation applies with equal force to the facts in our case. It is very apparent from what has been said that the trial court committed error in not submitting the issues of plaintiff-in-error, and in charging the jury that Chatman was a passenger and the opinion of this Honorable Court is in error in holding as a matter of law that Chatman was a passenger for hire.

For if Chatman was travelling by virtue of Section 1 of the Act he was a free passenger, and

If the consideration for his transportation was the services rendered or if he was granted any privileges not specified in *express terms* in the tariff, he was travelling in violation of law.

We could discuss the case more fully, but we will refer to the cases and argument in our original and reply briefs.

Respectfully submitted,

W. B. RODMAN,
C. M. BAIN,
J. KENYON WILSON,
Attorneys for Plaintiff-in-Error.

(66) **ORDER DENYING REHEARING.**

Filed and entered May 15, 1915.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

No. 1283.

Norfolk Southern Railroad Company, Plaintiff in Error,

*vs.*

W. C. Chatman, Defendant in Error.

Error to the District Court of the United States for the Eastern District of North Carolina, at Elizabeth City.

This Court having at its February Term, 1915, rendered its decision affirming the judgment of the said District Court in this cause, and the Plaintiff in Error, by its Attorneys, having on March 19, 1915, presented to the Court a petition for a rehearing of the cause, and the same having been carefully considered,

It is now here ordered by this Court that the rehearing asked for, be, and the same is hereby denied.

J. C. PRITCHARD,
Senior Circuit Judge Presiding.

May 15, 1915.

On another day, to-wit, May 19, 1915, the mandate of this Court in the above entitled cause is transmitted to the said District Court, at Elizabeth City, N. C., in due form.

And on the same day, to-wit, May 19, 1915, the original petition for writ of error, order allowing writ of error, and writ of error bond are returned to the Clerk of the U. S. District Court at Elizabeth City, N. C., in accordance with Sec. 7 of Rule 14.

**PETITION FOR WRIT OF ERROR.**

(67) Filed June 4, 1915.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

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No. 1283.

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Norfolk Southern Railroad Company, Plaintiff in Error,

*vs.*

W. C. Chatman, Defendant in Error.

Your Petitioner, Norfolk Southern Railroad Company, Plaintiff in Error in the above entitled cause, respectfully shows that the above entitled cause is now

pending in the United States Circuit Court of Appeals for the Fourth Circuit, and a judgment has therein been rendered on the 20th of February, 1915, affirming a judgment of the District Court of the United States for the Eastern District of North Carolina, and the matter in controversy in said suit exceeds one thousand ($1,000) dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in anywise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different states, and that this cause does not arise under the Patent Laws, or the Revenue Laws, or the Criminal Laws, and that it is not an Admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error, and, therefore, your Petitioner would respectfully pray that a writ of error be allowed it in the above entitled cause directing the clerk of the United States Circuit Court of Appeals for the Fourth Circuit to send the record and proceedings in said cause with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors (68) herewith filed by said Plaintiff in Error may be reviewed, and if errors be found, corrected according to the laws and customs of the United States.

NORFOLK SOUTHERN RAILROAD COMPANY,
By W. B. RODMAN,
C. M. BAIN,
J. KENYON WILSON,
Attorneys.

**ORDER ALLOWING WRIT OF ERROR.**

Filed and entered June 4, 1915.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

No. 1283.

Norfolk Southern Railroad Company, Plaintiff in Error,

*vs.*

W. C. Chatman, Defendant in Error.

On motion of C. M. Bain, Solicitor and of Counsel for the Plaintiff in Error in the above entitled cause, it is hereby ordered that a writ of error to the Supreme Court of the United States from the judgment hereby entered, be, and the same is hereby allowed as prayed for, and that a certified transcript of the record, testimony, stipulations, and all proceedings be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on writ of error be fixed at the sum of $2,500.00, the same to act as a supersedeas bond and also as a bond for costs and damages on said writ of error.

J. C. PRITCHARD,
Judge of the United States Circuit Court of
Appeals for the Fourth Circuit

(69) **ASSIGNMENT OF ERRORS.**

Filed June 4, 1915.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

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No. 1283.

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Norfolk Southern Railroad Company, Plaintiff in Error,
*vs.*
W. C. Chatman, Defendant in Error.

## ASSIGNMENT OF ERRORS.

Now comes the Norfolk Southern Railroad Company. Plaintiff in Error in the above entitled cause, and files its petition for a writ of error, and in connection therewith makes the following assignments of errors, upon which it will rely upon its prosecution of the writ of error in the above entitled cause, from the judgment and opinion rendered by this Honorable Court on the twentieth day of February, 1915.

## I.

The Circuit Court of Appeals for the Fourth Circuit committed error in affirming the action of the District Court in refusing to grant the Plaintiff in Error's request that the Court take the case from the jury and direct a verdict for the Defendant, as set out in bills of exception Nos. 4 and 5, which are hereby referred to and made a part hereof as fully as if the same were here specifically set forth, for the following reasons:

1. Plaintiff was not a passenger.

The evidence as introduced by the plaintiff shows that he had no ticket for passage on the train, and paid nothing extra for the carriage of himself as passenger, having only paid $55.00 for freight for the horses, which as shown by the bill of lading introduced in evidence at the trial of the case, was shown to be a reduced rate, upon the limited valuation of the horses. The only paper which he obtained was given him by the agent of the Pennsylvania Railroad, which shown on its face, was only a receipt for the bill of lading, and he obtained no other paper from anyone after getting to Norfolk, and (70) obtained no ticket for the carriage of himself over the lines of the Norfolk Southern Railroad.

2. Plaintiff released defendant from liability for injury sustained by him.

If it were to be construed from the evidence that the plaintiff was entitled to ride upon the train from the paper, which he claimed was given him to travel on, then the plaintiff was a gratuitous passenger, and the contract (43) among other things contained a release which was duly signed by the said W. C. Chatman, plaintiff, in words and figures as follows:

"In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers, named in the within contract, without charge, other than the sum paid, or to be paid for the carriage upon said freight train all the live stock mentioned in said contract, all of which live stock ——— in charge, the undersigned do hereby voluntarily assume all risk of accident or damage to person or property, and do hereby release and discharge the said carrier or carriers from every and

all claims for liability and damage, of every kind, nature and description, for or on account of, any personal injury or damage of any kind, sustained by the undersigned, so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employees or otherwise."

This defendant says that this said contract was valid in law, and binding upon the plaintiff, and it specially set up and pleaded same, in discharge of the cause of action stated in the complaint. That as the shipment was carried at a reduced rate, there was no consideration for the carriage of the plaintiff, and he was therefore a gratuitous passenger, if a passenger at all, and the release was valid as to a gratuitous passenger.

3. Plaintiff was riding in violation of law.

That upon the evidence in the case, it was shown from the tariffs filed with the Interstate Commerce Commission and according to law which by tariffs show the rates and charges of the movement of freight between (71) Jersey City, in the State of New Jersey, and Hertford, in the State of North Carolina, and as a part of said tariff it was stipulated that for that rate of freight, no caretaker should be transported, but if a caretaker desired to go over the said road, and accompany the stock, such caretaker should pay the full and regular fare for such passage.

That as the tariff set forth that no caretaker should be carried with the stock, unless he paid the full and regular fare for passage, the contract made between the plaintiff and the Pennsylvania Railroad was void, same being made in violation of the law. Therefore as the said contract was void, the plaintiff could not recover in an action based upon a void contract.

4. Plaintiff was upon train without authority of defendant.

Plaintiff was upon the train without any authority from the defendant, and the Pennsylvania Railroad Company had no authority to authorize the plaintiff to attempt to ride upon freight train of the defendant, and no conductor of a freight train or other servant of the defendant had authority to permit or authorize the plaintiff to ride upon the freight train in question.

II.

The United States Circuit Court of Appeals for the Fourth Circuit committed error in affirming the action of the District Court in refusing to submit to the jury the issues as offered by the defendant, which are set out in bill of exceptions No. 2, which said bill of exceptions is hereby referred to, and made a part hereof as fully as if the same were here specifically set forth, for the reason that the same correctly stated the issues which should have been submitted under the evidence as introduced in this case.

III.

The United States Circuit Court of Appeals for the Fourth Circuit committed error in sustaining the action of the District Court in submitting the issues as tendered by the plaintiff in this case, which are set forth in bill of exception No. 3, which bill of exception is hereby referred to, and made a part hereof, as fully as if the same were here specifically set forth, for the reason that under the issues as submitted to the jury, the jury couldn't find that the plaintiff has assumed the risks, nor were the (72) jury under these issues allowed to determine whether the plaintiff was a passenger, nor were the jury allowed to determine under the issues submitted whether the plaintiff had released the defendant from liability for any injuries sustained.

IV.

The United States Circuit Court of Appeals for the Fourth Circuit committed error in sustaining the action of the District Court, in refusing to grant the charges as requested by the defendant, which is set forth in bill of exception No. 6 to 13, which bill of exceptions is hereby referred to and made a part hereof, as fully as if the same were here specifically set forth, which said instructions were in the following words:

"1. The plaintiff contends that on the —— day of ————, 19—, he entered into a contract with the Pennsylvania Railroad Company, at Jersey City, by which the Pennsylvania Railroad Company agreed with the plaintiff that, in consideration of $————, it would trans-

port from Jersey City, in the State of New Jersey, to Hertford, in the State of North Carolina, ——— head of horses, and would furnish to the plaintiff free transportation for himself, as a caretaker, to accompany this shipment of stock.

The plaintiff further contends that with this shipment of stock it was necessary for the same to be moved over the line of the Pennsylvania railroad and connecting carriers to Berkley, in the State of Virginia, where it was delivered to the Norfolk Southern Railroad Company, the defendant.

The plaintiff further contends that on the 2d day of December, 1911, the Norfolk Southern Railroad Company, having received the carload of stock under the contract made on the —— day of ———, 19—, with the Pennsylvania railroad, placed said car of stock in a freight train and undertook to carry the same from Berkley, in the State of Virginia, to Hertford, in the State of North Carolina.

That when the train in which the carload of stock was being carried reached Moyock, in the State of North
(73) Carolina, the said train was derailed.

The plaintiff further contends that, under and by virtue of his contract made with the Pennsylvania railroad, he was riding on this train of the Norfolk Southern railroad in the freight car in which the live stock was being transported, and that when the car was derailed he was thrown down and injured.

The defendant contends, and has offered evidence to show, that at the time the stock in question was being transported from Jersey City, in the State of New Jersey, to Hertford, in the State of North Carolina, the Pennsylvania railroad and the Norfolk Southern railroad, and other intervening and connecting carriers, had duly filed and published with the Interstate Commerce Commission, and according to law, a tariff showing the rates and charges for the movement of freight between Jersey City, in the State of New Jersey and Hertford, in the State of North Carolina.

The defendant further contends, and the court charges you, that, if you believe the evidence you will find that the tariff so filed and published shows the rate of freight on stock between Jersey city, in the State of New Jersey, and Hertford, in the State of North Carolina, and shows that, as a part of the said tariff, it was stipulated that for that rate of freight no caretaker

should be transported, but if a caretaker desired to go over the said road to accompany said stock, that such caretaker should pay the full and regular fare for such passage."

"2. The defendant contends that, while it is true that the laws of the United States regulating Interstate Commerce authorize and permit a common carrier to give free transportation for caretakers, the court charges you that, as a matter of law, the Pennsylvania railroad could not by the issuance of its bill of lading undertake to contract to carry the plaintiff's carload of horses and plaintiff himself from Jersey City, in the State of New Jersey, to Hertford, in the State of North Carolina, at the price named for the carriage of the (74) horses alone, and especially in view of the tariff which had been duly filed and published showing that such transportation could not be given, or was not embraced."

"3. The Court, therefore, charges you, as a matter of law, that upon all the evidence in this case, the plaintiff's riding upon the said train of the defendant was in violation of the law and that plaintiff cannot recover, then you will answer the first issue, No."

"4. The court further charges you, as a matter of law, that, if you believe the evidence in this case, plaintiff was riding upon the train of defendant company in violation of the law of the United States, and under a contract made between plaintiff and the Pennsylvania railroad, which contract was void, being made in violation of the law, and, therefore, the law will not permit plaintiff to recover in an action of this kind, and you will answer the first issue, No, and the second issue 'none.'"

"5. The court charges you that, if you should find that the plaintiff was riding upon the defendant's train upon a free pass or free ticket, enjoying the privileges as riding thereon as a mere gratuity, and not as a traveller, having paid no compensation for the privileges of riding, then the plaintiff could not recover, as he contracted under his contract that he would, himself, assume all liability for accident, and this would be true whether the accident was caused by the negligence of the

defendant or not, and you will answer the first issue, No."

"6. If the jury find from the evidence that the plaintiff was riding upon the train of the defendant without the knowledge or authority of the defendant, the jury will answer the first issue, No."

"7. If the jury find from the evidence that the plaintiff was riding upon the train of the defendant, without any authority from the defendant, then the court charges you, as a matter of law, that the contract made between the plaintiff and the Pennsylvania railroad as set out (75) in the bill of lading, would not be sufficient authority to justify plaintiff in attempting to ride the freight train of defendant, and the jury will answer the first issue, No."

"8. The court charges you, as a matter of law, that the conductor of a freight train would not have authority to permit or authorize plaintiff to ride upon the freight train in question, and even though the jury should find from the evidence that the conductor of the freight train knew, or had reasonable ground to believe, that plaintiff was riding upon the train in question, and should further find that he was riding thereon, in pursuance to a contract made with the Pennsylvania railroad, then the court charges you that this would not justify the plaintiff in attempting to ride upon the train of the defendant, and plaintiff would be riding thereon without legal authority, and you would answer the first issue, No."

For the reasons that the charges as submitted by this defendant correctly stated the law, that the plaintiff was riding upon the train in violation of the law; while the court's charge incorrectly stated that the plaintiff was a passenger upon the train.

V.

The United States Circuit Court of Appeals for the Fourth Circuit committed error in refusing to hold that the District Court committed error in instructing the jury as set forth in bill of exception No. 14, which bill of exception is hereby referred to and made a part hereof as fully as if the same were hereby specifically set forth,

the District Court instructing the jury in the following words:

"The defendant denies that he became a passenger rightfully on the car at the time of the derailment. That contention raises a question of law, with which I will not trouble you. I charge you that if you find from the facts in the testimony here that he made a contract with the Pennsylvania Railroad to transport the horses and permit him to ride on the train and use the car to take care (76) of the horses, he became thereby a passenger over the road; then if you find that the Pennsylvania Railroad then delivered the car to the Norfolk Southern Railroad, and it was accepted by them, the Norfolk Southern Railroad became liable to the same extent as the Pennsylvania Railroad had theretofore become liable."

For the reasons that the court should have directed a verdict for the defendant; and from the evidence the District Court should have held that the said Chatman was not a passenger for hire upon said train of the plaintiff in error; and in charging the jury as a matter of law that Chatham was a passenger for hire.

VI.

That the United States Circuit Court of Appeals for the Fourth Circuit committed error in sustaining the action of the District Court in refusing to grant plaintiff in error's motion to set aside the verdict and grant a new trial, and for errors in the charge as set forth in defendant's bill of exceptions No. 1, as the fourteenth exception, for the reasons set forth in the preceding assignments of errors.

VII.

That the United States Circuit Court of Appeals for the Fourth Circuit committed error in sustaining the action of the District Court in signing and entering judgment as set out in the record in favor of the plaintiff (defendant in error), which error is pointed out in defendant's (plaintiff in error) bill of exception No. 1, as the fifteenth exception, for the reasons set forth in the preceding assignments of errors.

VIII.

That the United States Circuit Court of Appeals for the Fourth Circuit committed error in holding in its opinion that it was to the interest of the plaintiff in error from a pecuniary standpoint to have a caretaker in attendance from the time the stock was loaded until delivered to the consignee, and holding that this of itself constituted the consideration for the transportation issued to the caretaker. This of itself allowed the defendant in error to recover upon an illegal contract. The (77) consideration in such a case would be in contravention of the Interstate Commerce Act, the ruling of the Interstate Commerce Commission and the ruling of the Supreme Court of the United States.

IX.

The United States Circuit Court of Appeals for the Fourth Circuit committed error in holding that under the provisions of the tariff and the exceptions of paragraph 1 of the Interstate Commerce Act it was the duty of the plaintiff in error to issue transportation to the defendant in error, while accompanying the stock, in consideration for the services rendered. This ruling was in violation of Section 6 of the Interstate Commerce Commission, and Conference Ruling No. 207 of the Interstate Commerce Commission, and is not in harmony with the decisions of the Supreme Court of the United States, which hold that a carrier cannot accept anything except money as consideration for the transportation of passengers and property.

X.

The United States Circuit Court of Appeals for the Fourth Circuit committed error in distinguishing this case from the case of *Charleston & W. C. R. Co.* vs. *Thompson*, 234 U. S. 576. In the complaint in this case the plaintiff (defendant in error) alleged that he was travelling between Jersey City, N. J., and Hertford, N. C., on a drover's pass. The answer of the defendant (plaintiff in error) set up the provisions of its tariff and alleged that he was on the train in violation of law, but that if he was not on the train in violation of law he had released the defendant (plaintiff in error) from liability

as he was being carried upon said train without charge. It was clearly set forth in the release that Chatham was being carried upon the train without charge, and claimed the benefit of said release. The plaintiff (defendant in error) in his reply to the complaint set forth again that he was riding on the train on a drover's pass, and claimed that it was issued by authority of the excepted classes in Section 1 of the Interstate Commerce Act. Under these pleadings alone judgment should have been entered for the defendant (plaintiff in error) and the evidence also showed that plaintiff (defendant in error) paid nothing for his transportation, the only amount paid being the freight for the transportation of the stock.

XI.

(78) The United States Circuit Court of Appeals for the Fourth Circuit committed error in holding that the transportation of Chatman was given in consideration of an agreement on the part of the caretaker that the carrier should not be bound to exercise such care and diligence as would otherwise have been incumbent upon it in order to secure the safe transportation of the stock. This would be an illegal consideration, as nothing but money can be accepted as consideration for the transportation of passengers and property.

XII.

The United States Circuit Court of Appeals for the Fourth Circuit committed error in holding as a matter of law that Chatham was a passenger for hire. Under the pleadings and evidence it was at least a matter for the jury to determine.

XIII.

The United States Circuit Court of Appeals for the Fourth Circuit committed error in not holding as a matter of law that Chatham was a free and gratuitous passenger and that, therefore, the release executed by him was valid, for Chatham to have been lawfully upon the train he must have been there solely by virtue of Section 1 of the Interstate Commerce Act providing for free passes to be given caretakers of live stock. The plaintiff (defendant in error) claimed that he was on the train in accordance with Section 1 of the Interstate Commerce

Act and all passes issued for interstate transportation under the provisions of Section 1 of the Interstate Commerce Act are free and gratuitous as a matter of law.

XIV.

That the United States Circuit Court of Appeals for the Fourth Circuit, for the various reasons set forth, committed error in rendering the judgment it did against the defendant (plaintiff in error), Norfolk Southern Railroad Company, in this action.

Wherefore, plaintiff in error prays that the judgment be reversed and that the United States Circuit Court of Appeals for the Fourth Circuit be ordered to enter an order reversing its former decision in said (79) cause, and direct the District Court for the Eastern District of North Carolina at Elizabeth City to enter judgment for it, the plaintiff in error, or to grant it a new trial of said cause, according to its rights in the premises.

NORFOLK SOUTHERN RAILROAD COMPANY.

By W. B. RODMAN,
C. M. BAIN,
J. KENYON WILSON,
Its Attorneys.

(81) **CITATION.**

Issued June 4, 1915.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

---

No. 1283.

---

Norfolk Southern Railroad Company, Plaintiff in Error,

*vs.*

W. C. Chatman, Defendant in Error.

THE UNITED STATES OF AMERICA:

The President of the United States, to W. C. Chatman, and Chas. Whedbee and P. W. McMullan, his Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the 3rd day of July, 1915; pursuant to an order allowing a writ of error filed and entered in the Clerk's Office of the United States Circuit Court of Appeals for the Fourth Circuit, from judgment entered on the 20th day of February, 1915, in that certain action at law being No. 1283, wherein Norfolk Southern Railroad Company is Plaintiff in Error and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against said Plaintiff in Error, as in said order allowing the writ of error mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable J. C. Pritchard, United States Circuit Judge, and one of the Judges of the United States Circuit Court of Appeals for the Fourth Circuit.

This 4th day of June, 1915.

J. C. PRITCHARD,
Judge of the United States Circuit Court of Appeals for the Fourth Circuit.

Legal service of the within Citation accepted this the 27th day of May, 1915.

CHAS. WHEDBEE,
Attorney for W. C. Chatman.

(82) **WRIT OF ERROR.**

Issued June 4, 1915.

UNITED STATES OF AMERICA, SS:

The President of the United States, To the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between the Norfolk Southern Railroad Company, Plaintiff in Error, and W. C. Chatman, Defendant in Error, a manifest error hath happened, to the great damage of the said Plaintiff in Error as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this Fourth day of June, in the year of our Lord one thousand nine hundred and fifteen.

(Seal of Court) HENRY T. MELONEY,
Clerk of the United States Circuit Court of Appeals for the Fourth Circuit.

By CLAUDE M. DEAN,
Deputy Clerk.

Allowed by

J. C. Pritchard,
U. S. Circuit Judge.

**SERVICE OF WRIT OF ERROR.**

The foregoing writ of error is served by lodging a copy thereof for the adverse party in the Clerk's Office of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, where the record remains, on the Fourth day of June, 1915.

Attest:

HENRY T. MELONEY, Clerk.
By CLAUDE M. DEAN, Deputy Clerk.

(83)

## SUPERSEDEAS BOND.

Filed June 9, 1915.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

---

No. 1283.

---

Norfolk Southern Railroad Company, Plaintiff in Error,
*vs.*
W. C. Chatman, Defendant in Error.

Know All Men By These Presents, That we, Norfolk Southern Railroad Company, as principal, and United States Fidelity and Guaranty Company, as Surety, are held and firmly bound unto W. C. Chatman in the full and just sum of Twenty-five Hundred Dollars ($2,500.00 00/100) to be paid to the said W. C. Chatman, his heirs, executors, administrators, successors, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of June, in the year of our Lord, one thousand, nine hundred and fifteen.

Whereas, lately at the February Term of the United States Circuit Court of Appeals for the Fourth Circuit, in a suit depending in said Court between Norfolk Southern Railroad Company, Plaintiff in Error, and W. C. Chatman, Defendant in Error, judgment was rendered against the said Norfolk Southern Railroad Company, Plaintiff in Error, and the said Norfolk Southern Railroad Company has obtained writ of error of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said W. C. Chatman, citing and admonishing him to be and appear in the Supreme Court of the United States at the City of Washington, District of Columbia, on the 3rd day of July, in the year of our Lord, one thousand nine hundred and fifteen.

Now the Condition of the Above Obligation is such, that if the said Norfolk Southern Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, otherwise to remain in full force and virtue.

NORFOLK SOUTHERN RAILROAD COMPANY.

By J. H. YOUNG,
President.

(Seal of Norfolk Southern Railroad Co.)

Attest:

M. H. HAWKINS,
Secretary.

UNITED STATES FIDELITY AND GUARANTY COMPANY.

By E. LESLIE SPENCE, JR., (Seal)
Attorney-in-Fact.

(Seal U. S. Fidelity & Guaranty Co.)

Signed and sealed in presence of

C. M. DEAN,
Dep. Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

Approved by:

J. C. PRITCHARD,
U. S. Circuit Judge.

(84) **CLERK'S CERTIFICATE.**

UNITED STATES OF AMERICA, SS:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true transcript of the record and

proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 1st day of July, A. D., 1915.

(Seal of Court)

HENRY T. MELONEY,
Clerk, U. S. Circuit Court of Appeals,
Fourth Circuit.

By CLAUDE M. DEAN,
Deputy Clerk.

DEC 2
JAMES D

# IN THE
# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

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NORFOLK SOUTHERN RAILROAD COMPANY,
Plaintiff in Error.

against

W. C. CHATHAM,
Defendant in Error

---

No. 192.

---

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

---

## BRIEF OF PLAINTIFF IN ERROR.

---

JOHN H. SMALL,
W. B. RODMAN,
C. M. BAIN,
J. KENYON WILSON,

Attorneys for
Norfolk Southern Railroad Company,
Plaintiff in Error.

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# IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

---

NORFOLK SOUTHERN RAILROAD COMPANY,
Plaintiff in Error.

against

W. C. CHATHAM,
Defendant in Error

---

No. 192.

---

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

---

## BRIEF OF PLAINTIFF IN ERROR.

---

In this brief plaintiff in error will be called defendant, or railroad company, and defendant in error will be called plaintiff, or Chatman.

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## STATEMENT OF THE CASE.

This action was originally tried in the District Court of the United States for the Eastern District of North Carolina at Elizabeth City. Plaintiff in complaint alleged

that he was injured while traveling upon the line of the Norfolk Southern Railroad Company between Norfolk, Va., and Hertford, N. C., being on said train by virtue of a drover's pass issued to the said plaintiff, and claimed damages in the sum of $6,000.00. (Rec. p. 2). Upon the trial the jury rendered a verdict in favor of the plaintiff for $1,550.00, and judgment entered accordingly. Upon writ of error to the United States Circuit Court of Appeals for the Fourth Circuit, the judgment of the District Court was affirmed (for report of case see 222 Fed. Rep. 802).

This writ of error brings up for review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit affirming the judgment of the United States District Court for the Eastern District of North Carolina.

The defendant in its answer to the complaint stated, that at the time of the alleged injury it was, and still is, a corporation operating a line of railroad running from Norfolk, in the State of Virginia, to Hertford, in the State of North Carolina, and other points, and as such was a common carrier engaged in interstate commerce by railroad. It was admitted that on December 3rd, 1911, plaintiff, while in charge of a carload of horses, was riding on one of the trains of the defendant and had entered into a contract with the Pennsylvania Railroad Company, a corporation engaged in interstate commerce by railroad, for transportation of a number of horses, said contract being attached to the answer. (Rec. p. 5). That said car of stock was delivered to the defendant at Berkley, Va., to be by it transported to Hertford, N. C., said car being received by defendant in accordance with the terms of said contract. That the said contract, among other things, contained a release from the plaintiff, releasing the defendant in consideration of the free carriage, from all claims, liabilities or demands for, or on account of, personal injuries sustained while riding on its train under said contract, and assumed all risk of injury to

his person. Said release was fully set up in said answer and the benefit of same claimed. (Rec. p. 6).

That in accordance with an Act of Congress regulating interstate commerce, to-wit, "An Act entitled an Act to Regulate Commerce" approved Feb. 4, 1887 and Acts Amendatory thereto, said defendant had filed with the Interstate Commerce Commission a tariff covering rates on horses and mules and other live stock, between Berkley, Va. and Hertford, N. C., under which said tariff the railroad was not permitted or authorized to carry the plaintiff free of charge, but that under said tariff plaintiff was required to pay his fare. That said plaintiff had not paid his fare, was riding in violation of law, without the consent of the defendant, and if riding with the consent of an agent of the Company, that the agent had no authority to permit the plaintiff to ride in violation of law, and that there should be no recovery, as palintiff was riding in violation of the laws of the United States, commonly known as the Interstate Commerce Act. (Rec. p. 7).

Plaintiff filed a replication to said answer, claiming that the release was obtained by fraud and further claiming that the drover's pass on which he was riding was legally issued to the plaintiff and to support this contention, plaintiff set up the fact that he was riding upon the train as a party coming within the excepted classes of Section 1 of the Interstate Commerce Act, permitting passes to be given to caretakers in charge of live stock. (Rec. pp. 9 and 10).

Upon trial before the District Court, evidence was introduced showing that:—

> The Pennsylvania Railroad Company and Norfolk Southern Railroad Company, two common carriers by railroad, engaged in interstate commerce, acting under the provisions of an Act to Regulate Commerce, approved Feb. 4th, 1887, and the numerous and sundry amendments thereto and generally

referred to as the Act to Regulate Interstate Commerce, or the Interstate Commerce Act, had prior to December 1st, 1911, established through routes and joint rates for the shipment of horses from Jersey City, in the State of New Jersey, to Hertford, in the State of North Carolina, via Norfolk: and prior to the 1st day of December, 1911, duly filed and published, in accordance with law, rules, regulations and rates for the transportation of live stock between the aforesaid points, over the said through route.

The rates, rules and regulations governing the transportation of live stock over such through route between the aforesaid points is set out on pages 20 to 26, inclusive, of the Record. The tariff of the carriers, among other regulations, provided:

"FREE OR REDUCED TRANSPORTATION SHALL NOT BE ISSUED FOR SHIPPERS OR CARETAKERS IN CHARGE OF LIVE STOCK SHIPMENTS, WHETHER CAR LOADS OR LESS, AND SUCH SHIPPERS OR CARETAKERS SHALL PAY FULL FARE RETURNING." (See Record, page 25).

On December 1st, 1911, when the above regulation was in force and effect, plaintiff, Chatman, tendered to the Pennsylvania Railroad Company, at its station in Jersey City, New Jersey, nine (9) Horses, one (1) stud, and one (1) colt for shipment to Hertford, North Carolina, and duly executed the bill of lading or uniform live stock contract, set out on pages 16 to 19, both inclusive, of the Record. On the reverse side of the said bill of lading, or uniform live stock contract, is a release for man or men in charge, which release was duly signed by the plaintiff, Chatman, and reads as follows:

"RELEASE FOR MAN OR MEN IN CHARGE."

"In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers, named in the within contract, without charge, other than the sum paid or to be paid for the carriage upon said freight train of the live stock mentioned in said contract: of which live stock * * * * * in charge, the undersigned do * * * * hereby voluntarily assume all risks of accidents or damage to * * * * person or property, and do hereby release and discharge said carriers from every and all claims, liabilities and demands of every kind, nature and description for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of the said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employees or otherwise."

(Signature of man in charge.)

"W. C. CHATMAN."

(Rec. pp. 19 and 20.)

At the time of the execution of the uniform live stock contract set out in the Record, and referred to above, the Pennsylvania Railroad Company delivered to plaintiff, Chatman, coupon of said uniform live stock contract, reading as follows:

"PENNSYLVANIA RAILROAD COMPANY."

"Coupon of Uniform Live Stock Contract No. 872."

"120 Jersey City Station, Dec. 1st, 1911."

"W. C. Chatman delivered to the Pennsylvania Railroad Company, (subject to all the conditions of the Uniform Live Stock Contract, executed as of even date herewith, and now in the possession of the said Company, of which this coupon is part) Live

Stock of the kind and number, and consigned and destined as follows:

Consignee, W. C. Chatman.
Destination Point, Norfolk, Va.
For Hertford, N. C.
Number and description of one chartered car,

containing Stock (shippers load and count), nine (9) horses, one (1) stud horse and one (1) colt.

Released to a valuation of $100 each, watered and fed at 12 noon P. M.

W. C. Chatman, man in charge.
Weight subject to correction_____.
Advances $_____.
Car Nos. and Initials, Penna. Co., 581461.

Witness his hand and seal this day and year above written.

(Said shipper hereby states that the said animals tendered to the carrier for shipment are not affected with glanders.)" (Rec. pp. 13 and 14.)

The plaintiff, Chatman, accompanied the stock from Jersey City to Norfolk. After the car in which the stock was transported reached Norfolk and while the train of the defendant, Norfolk Southern Railroad Company, was being made up, the conductor saw plaintiff in the car with the stock. Plaintiff asked conductor what time the train left, and was informed that it would leave about one o'clock. Plaintiff remained in the car and rode therein as far as Moyock, when the car in which he was riding was derailed.

Plaintiff claims to have been injured by this derailment, the stock was not injured.

The defendant conductor testified that he did not see plaintiff in the car, did not know that he was there until the

derailment, that plaintiff paid no fare and that he did not know that the plaintiff was on the train until after the derailment.

Plaintiff in his replication alleged the release was obtained by fraud. But there was no evidence of fraud before the Court, and the Court did not submit any issue as to fraud to the jury.

## MOTION TO DISMISS.

At the conclusion of the plaintiff's evidence, defendant moved to dismiss the action and have judgment of nonsuit, this motion was overruled and defendant excepted. (Rec. p. 16).

Again at the conclusion of all the evidence the defendant moved to dismiss the action and have a judgment of nonsuit, the motion being again overruled and defendant excepted. (Rec. p. 27).

## ISSUES REQUESTED AND REFUSED.

The defendant requested the following issues to be submitted to the jury.

1. Was the plaintiff injured by the negligence of the defendant while riding on the defendant's train as a passenger, as alleged in said complaint?

2. What damage, if any, is the plaintiff entitled to recover for said injury?

3. Did the plaintiff assume the risks of injury in traveling upon the defendant's train and release the defendant therefrom? (Rec. p. 12).

The court declined to submit these issues and the defendant excepted.

## ISSUES SUBMITTED BY COURT.

Whereupon issues were submitted to the jury by the court and answered as follows:

1. Was plaintiff injured by the negligence of the defendant as alleged in complaint?

A. Yes.

2. What damages, if any, is plaintiff entitled to recover?

A. $1,550.00. (Rec. pp. 11 and 12).

## JUDGMENT ENTERED.

Upon this verdict judgment was rendered by the District Court of the U. S. for the Eastern District of North Carolina against the defendant, for the sum of $1,550.00. Defendant obtained writ of error to the United States Circuit Court of Appeals for the Fourth Circuit. The case was argued at the November Term of 1914, and the judgment of the District Court was affirmed in an opinion by Judge Pritchard. The defendant thereupon sued out this writ of error. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit is printed in full in the Record, pages 49 to 57, and will also be found in 222 Fed. Rep. page 802.

## SPECIFICATIONS OF ERROR.

The plaintiff in error specifies and relies upon the following errors committed by the United States Circuit Court of Appeals for the Fourth Circuit:

FIRST: Said Circuit Court of Appeals erred in affirming the action of the District Court in refusing to take the case from the jury and directing a verdict for the defendant for the following reasons:

(a) Plaintiff was not a passenger.

(b) Plaintiff had released defendant from liability for any injury sustained by him.

(c) Plaintiff was riding in violation of law.

(d) Plaintiff was upon the train without authority of the defendant.

SECOND: The United States Circuit Court of Appeals for the Fourth Circuit erred in affirming the action of the District Court in refusing to submit to the jury the issues tendered by the defendant, and submitting the issues which it did, for under the issues which were submitted by the court the jury could not find that the plaintiff had assumed the risks, nor were they allowed to determine whether the plaintiff was a passenger, nor were they allowed to determine whether the plaintiff was riding in violation of law; nor were they allowed to determine whether the plaintiff had released the defendant from liability.

THIRD: The United States Circuit Court of Appeals for the Fourth Circuit committed error in upholding the trial court in refusing to grant the defendant's request for a special instruction to the jury, as follows:

> "The court, therefore, charges you, as a matter of law, that upon the evidence in this case, the plaintiff's riding upon the train of the defendant was in violation of law, and that plaintiff cannot recover, then you will answer the first issue, No." (Rec. p. 29).

FOURTH: The United States Circuit Court of Appeals for the Fourth Circuit committed error in upholding the trial court in refusing to grant the defendant's request for special instruction to the jury, as follows:

> "The court further charges you, as a matter of law, that, if you believe the evidence in this case,

plaintiff was riding upon the train of defendant company in violation of the laws of the United States, and under a contract made between plaintiff and the Pennsylvania Railroad, which contract was void, being made in violation of the law, and, therefore, the law will not permit plaintiff to recover on an action of this kind, and you will answer the first issue, No, and the second issue "none." (Rec. p. 29).

FIFTH: The United States Circuit Court of Appeals for the Fourth Circuit committed error in upholding the trial court in refusing to grant the defendant's request for special instruction to the jury, as follows:

> "The court charges you that, if you should find that the plaintiff was riding upon the defendant's train upon a free pass or free ticket, enjoying the privileges and riding thereon as a mere gratuity, and not as a traveller, having paid no compensation for the privileges of riding, then the plaintiff could not recover, as he contracted under his contract that he would, himself, assume all liability for accident, and this would be true whether the accident was caused by the negligence of the defendant or not, and you will answer the first issue, "No." (Rec. p. 29).

SIXTH: The United States Circuit Court of Appeals for the Fourth Circuit committed error in upholding the trial court in refusing to grant the defendant's request for special instruction to the jury, as follows:

> "If the jury find from the evidence that plaintiff was riding upon the train of the defendant without the knowledge or authority of the defendant, the jury will answer the first issue, No." (Rec. p. 29).

SEVENTH: The United States Circuit Court of Appeals for the Fourth Circuit committed error in upholding

the trial court in refusing to grant the defendant's request for special instruction to the jury, as follows:

> "If the jury find from the evidence that the plaintiff was riding upon the train of the defendant, without any authority from the defendant, then the court charges you, as a matter of law, that the contract made between the plaintiff and the Pennsylvania Railroad, as set out in the bill of lading, would not be sufficient authority to justify plaintiff in attempting to ride the freight train of defendant, and the jury will answer the first issue, No." (Rec. p. 30).

EIGHTH: The United States Circuit Court of Appeals for the Fourth Circuit committed error in upholding the trial court in refusing to grant the defendant's request for special instruction to the jury, as follows:

> "The court charges you, as a matter of law, that the conductor of a freight train would not have authority to permit or authorize plaintiff to ride upon the freight train in question, and even though the jury should find from the evidence that the conductor of the freight train knew, or had reasonable ground to believe, that plaintiff was riding upon the train in question, and should further find that he was riding thereon, in pursuance to a contract made with the Pennsylvania Railroad, the court charges you that this would not justify the plaintiff in attempting to ride upon the train of the defendant, and plaintiff would be riding thereon without legal authority, and would answer the first issue, No." (Rec. p. 30).

NINTH: The said United States Circuit Court of Appeals for the Fourth Circuit committed error in upholding the trial court in granting instruction to the jury, as follows:

"The defendant denies that he became a passenger rightfully on the car at the time of the derailment. That contention raises a question of law, with which I will not trouble you. I charge you that if you find from the facts in the testimony here, that he made a contract with the Pennsylvania Railroad to transport the horses and permit him to ride on the train and use the car to take care of the horses, he became thereby a passenger over that road; then if you find that the Pennsylvania Railroad then delivered the car to the Norfolk Southern Railroad, and it was accepted by them, the Norfolk Southern Railroad became liable to the same extent as the Pennsylvania Railroad had theretofore become liable." (Rec. p. 31).

TENTH: That the United States Circuit Court of Appeals for the Fourth Circuit committed error in refusing to grant defendant's motion to set aside the verdict and grant a new trial.

ELEVENTH: That the United States Circuit Court of Appeals for the Fourth Circuit committed error in sustaining the action of the District Court in signing and entering judgment set out in the Record in favor of the Plaintiff.

TWELFTH: That the United States Circuit Court of Appeals for the Fourth Circuit committed error in rendering final judgment against the defendant, Norfolk Southern Railroad Company, which is complained of in this case.

THIRTEENTH: That the United States Circuit Court of Appeals for the Fourth Circuit committed error in its opinion in holding that it was to the interest of the Railroad Company from a pecuniary standpoint to have the caretaker in attendance, and in holding that this of itself constituted the consideration for the transportation of the plaintiff.

FOURTEENTH: That the United States Circuit Court of Appeals for the Fourth Circuit committed error in

holding that under the provisions of the tariff and the excepted classes of Section 1 of the Interstate Commerce Act, it was the duty of the defendant to issue transportation to the plaintiff while accompanying the stock, in consideration of the services rendered.

FIFTEENTH: The United States Circuit Court of Appeals for the Fourth Circuit committed error in distinguishing the case at bar from the case of Charleston etc. R. Co. vs. Thompson, 234 U. S., 575.

SIXTEENTH: The United States Circuit Court of Appeals for the Fourth Circuit committed error in holding that the transportation of the plaintiff was given in consideration of an agreement on the part of the caretaker that the carrier should not be bound to exercise such care and diligence as would otherwise have been incumbent upon it in order to secure the safe transportation of the stock.

SEVENTEENTH: The United States Circuit Court of Appeals for the Fourth Circuit committed error in holding, as a matter of law, that the plaintiff was a passenger for hire.

EIGHTEENTH: The United States Circuit Court of Appeals for the Fourth Circuit committed error in not holding, as a matter of law, that the plaintiff was a free and gratuitous passenger, and, therefore, the release executed by him was valid.

NINETEENTH: The United States Circuit Court of Appeals for the Fourth Circuit, for the various reasons above set forth committed error in rendering the final judgment it did against the defendant in this action.

## QUESTIONS IN THE CASE.

The questions involved in this writ of error can be narrowed down to the following:

1. Was the plaintiff a gratuitous passenger, and if so, did he release the defendant from liability?

2. If the plaintiff was not a gratuitous passenger, was he on the train of the defendant in violation of law, and if so, can he recover on a contract which is in violation of the laws or the Statutes of the United States?

These two propositions present questions arising directly under an Act of Congress generally known as An Act to Regulate Commerce, and the construction of the said Act by the District Court of the United States and the United States Circuit Court of Appeals for the Fourth Circuit is directly contrary to the opinions of this Honorable Court on the same propositions under similar statements of facts.

These questions are raised as follows:

FIRST: By motion in the trial court to dismiss the action and have judgment of nonsuit, for under the pleadings and plaintiff's own evidence, he was not entitled to recover. This motion was renewed at the conclusion of all the evidence. The motion was denied by the trial court and action of the trial court was affirmed by the United States Circuit Court of Appeals for the Fourth Circuit.

SECOND: By request of the trial court to instruct the jury that the plaintiff was riding in violation of law, which was refused, and such refusal affirmed by the United States Circuit Court of Appeals for the Fourth Circuit.

THIRD: By request of the trial court to instruct the jury that plaintiff was riding upon defendant's train upon a free pass as a mere gratuity and not as a traveller and could not recover as he had released defendant from liability and assumed all risks of injuries. Refusal to give said instructions being affirmed by the United States Circuit Court of Appeals for the Fourth Circuit.

FOURTH: By defendants exception to the instruction given by the trial court to the jury and approved by United States Circuit Court of Appeals for the Fourth Cir-

cuit, holding, as a matter of law, that the plaintiff was a passenger for hire.

FIFTH: By motion for a new trial, by motion to set aside verdict, by exception to judgment, and by petition for rehearing, filed with the United States Circuit Court of Appeals for the Fourth Circuit, after its opinion had been rendered.

## ARGUMENT.

### WAS PLAINTIFF A GRATUITOUS PASSENGER, AND IF SO, DID HE RELEASE THE RAILROAD COMPANY FROM LIABILITY?

We shall first take the question of the plaintiff being a gratuitous passenger, and if so, whether he released the defendant from liability.

### WAS PLAINTIFF A GRATUITOUS PASSENGER?

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### PLEADINGS:

The plaintiff in his complaint based his action on the fact that he was travelling in the car with the stock by virtue of a drover's pass, and that while so riding he was injured by the negligence of the defendant. The Railroad Company in its answer set up the defense that Chatman had entered a contract with the Pennsylvania Railroad Company, which said contract among other things, contained a release signed by the said plaintiff, which was duly set out in the answer of the defendant, and the said railroad company especially pleaded the said release in discharge of the cause

of action stated in the complaint (Record pp. 5 and 6). Chatman replying to the answer of the Railroad Company, especially set up the fact that he was riding upon the train as a party coming within the excepted classes to whom Congress permitted free passes to be given, and especially pleaded the provisions of Section 1 of the Act to Regulate Interstate Commerce. (Record p. 10) Chatman admitted that the only paper of any kind which he received was the coupon which had been issued by the Pennsylvania Railroad Company, and introduced in evidence (Record p. 13), and admitted his signature to the Live Stock Contract (Record pp. 16 to 20 inc.)

Chatman admitted that he paid no fare for himself. The only amount paid was the freight for the carriage of the shipment of horses. Therefore, if Chatman was riding on a drover's pass as alleged, the same was a gratuitous pass. The shipment was made under the tariff which provided that the animals were released to a valuation of $100.00 each, and the tariff provided that free transportation should not be given to caretakers or shippers of live stock. There can be only one conclusion, and that is that if the shipper desired to have a caretaker accompany the stock, then he should pay the regular passenger fare. Upon this basis the carrier fixed the charges in proportion to the risks that might be encountered. In fixing the rate to carry live stock for a certain amount upon their being released, and further providing that free transportation should not be given a caretaker, the natural conclusion is that the carrier did not take into consideration the risks that it would encounter in carrying a caretaker. And so it was provided that if the carrier was to have the risk of carrying a caretaker, who was to be considered a passenger then the caretaker should pay his fare. It necessarily follows that Chatman was riding gratuitously.

In the reply of the plaintiff to the answer of the defendant that the plaintiff was riding in violation of law, the

plaintiff especially set up the following portion of Section 1 of the Act to Regulate Interstate Commerce:

> "No common carrier subject to the provisions of this Act, shall, after January the first, 1907, directly or indirectly, issue or give any interstate free tickets, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law, * * * * * to necessary caretakers of live stock, poultry, milk and fruit." (Record p. 10).

The railroad pleaded the free pass given to the plaintiff and especially set up the release (signed by Chatman), which provided that the Railroad should not be liable for injury. (Record pp. 5 and 6).

This pass if valid was only valid on account of the Hepburn Act of June 29th, 1906, Chap. 3591, 31 (34 Stat. at L. 594, U. S., Comp. Stat. Supp. 1911, p. 1288) as above quoted from plaintiff's reply to answer.

## ALL PASSES UNDER HEPBURN ACT ARE FREE PASSES.

The Supreme Court of the United States has very recently had this question before it in the case of Charleston & W. C. R. Co. vs. Thompson, (234 U. S. 576) and we can do no more than quote from the opinion of Mr. Justice Holmes, in that case:

> "The main question is whether, when the statute permits the issue of a 'free pass' to its employees and their families, it means what it says. The railroad was under no obligation to issue the pass. It may be doubted whether it could have entered into one, for then the services would be the consideration for the

> duty and the pass, and by Section 6 it was forbidden to charge 'a greater or, less or different compensation' for transportation of passengers from that in its published rates. The antithesis in the Statute is between the reasonable charges to be shown in the schedule and the free passes which it may issue, only to those specified in the Act. To most of those enumerated, the free pass obviously would be gratuitous in the strictest sense, and when all that may receive them are grouped in a single exception, we think it plain that the statute contemplated *the pass as gratuitous in the same sense to all.*" (Italics ours.)

The above case clearly holds that a pass issued by the carrier under authority of Section 1 of the Act to Regulate Commerce, to any of the excepted classes, is gratuitous in the strictest sense. This opinion is final as to all questions of free passes issued under authority of the Hepburn Act.

In the Thompson case, Supra, the Court of Appeals of Georgia, held that a release in a free pass was valid:

> "but held that the Hepburn Act created an exception, and that a so-called free pass under that Act issued to a member of an employee's family, really was not a free pass, but was issued upon the consideration of the services of the employee."

After the writ of error was taken out, the Court of Appeals of Georgia modified its statement, saying that the jury might infer that the pass was issued for value, but this Court said:

> "But no such issue was before the jury, as the defense had been excluded altogether, and apart from other objections we are of opinion that the change does not help the decision."

And further:

> "The law did not contemplate his work as an inducement for the pass, but, on the contrary, contemplated the pass as being what it called itself, *free*." (Italics ours.)

## SIMILARITY OF THOMPSON CASE AND CASE AT BAR.

The ruling of the District Court in the case at bar, in refusing to direct a verdict for the defendant and further in refusing to instruct the jury that if they found that the plaintiff was riding on a free pass or free ticket, they then should answer the first issue, No, was identical with the rulings of the Lower Court, and the Court of Appeals of Georgia in the Thompson case. In the Thompson case the plea of the railroad was stricken out, and the instruction, requested by the railroad, that if the plaintiff was riding on a free pass, providing that the railroad should not be liable for negligent injury to her person, she could not recover, was refused. The construction of the Court of Appeals on these two rulings of the Lower Court was assigned as error, and this Court held that both rulings were erroneous, and reversed a judgment for the plaintiff.

It is true that the plaintiff in his replication alleged that the release was procured by fraud. But there was no evidence of that fact before the Court, and Court did not submit any issue, as to fraud, to the jury.

## DID CHATMAN ASSUME THE RISKS OF RIDING UPON THE TRAIN OF THE RAILROAD COMPANY AND RELEASE IT FROM LIABILITY?

The question then, as was said by the Supreme Court of the United States in the case of Northern Pacific R. R. Co. vs. Adams (infra), is distinctly presented whether a railroad company is liable in damages to a person injured through the negligence of its employees, who at the time is

riding on a pass given as a gratuity, and upon the conditions: known to and accepted by him, that it shall not be responsible for such injuries.

In Northern Pac. R. R. Co. vs. Adams, 192 U. S., 440; 48 L. Ed. 513; 24 Sup. Ct. Rep. 408, the Court said:

> "The railroad company was not, as to Adams, a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches, without charge if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and having accepted the privileges cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit, and free passengers are not so many as to induce negligence on its part. So far as the elements of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make and no public policy was violated thereby."

The above quotation fully covers the case before us.

If the pass was free under the statute, there is no question of the validity of its stipulations.

Charleston etc. R. Co. vs. Thompson (Supra).

Northern Pac. R. Co. vs. Adams (Supra).

Boering vs. Ches. Beach R. Co. 193 U. S., 442; 48 L. Ed. 742; 24 Sup. Ct. Rep. 515.

Baltimore etc. R. Co. vs. Voight, 176 U. S., 498; 44 L. Ed. 560.

Baltimore etc. R. Co. vs. Robinson 237 U. S., 84; 59 L. Ed. 849:

Chatman acknowledged that he signed the release, therefore he cannot say that he did not know the contents, and having accepted the pass, he must have done so upon the conditions expressed therein, whether actually read by him or not.

Boering vs. Ches. Beach R. Co. (Supra).

Quimby vs. Boston etc. R. Co. 150 Mass. 365; 5 LRA 846; 23 N. E. 205.

Squire vs. New York C. R. R. Co. 98 Mass. 239; 93 Am. Dec. 162.

Hill vs. Boston etc. R. Co., 144 Mass. 294; 10 N. E., 836.

Boston etc. R. Co. vs. Chapman, 146 Mass; 107 N. E. 940.

Muldoon vs. Seattle City R. Co. 10 Wash. 311, 313; 38 Pac. 995, 996.

We cannot do more than refer to the concluding words of the opinion of Mr. Justice Brewer in the case of Boering vs. Chesapeake etc. R. Co. (Supra).

> "As was well observed by Circuit Judge Putman, in Duncan vs. Maine C. R. Co. 113 Fed. 508, 514, in words quoted with approval of the Court of Appeals, in this case:
>
> " 'The rescult we have reached conforms the law applicable to the present issue to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted.' "

## CASES CITED IN OPINION NOT APPLICABLE.

The cases cited in the opinion of the United States Circuit Court of Appeals for the Fourth Circuit, were either decided prior to the passage of the Interstate Commerce Act, or before it took its present form, or were cases of intrastate commerce, or they failed to note the change made in the Act.

## CONSIDERATION FOR TRANSPORTATION.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit holds that the consideration for the transportation of the plaintiff was services rendered, or the release contained in the live stock contract, or implying that the consideration was included in the amount paid for the transportation of the stock. This would allow the plaintiff to recover on an illegal contract. The liability of the defendant and the right of the plaintiff to recover under an illegal contract, will be fully discussed later.

## CAN CARRIER ACCEPT ANYTHING OTHER THAN MONEY FOR TRANSPORTATION IN INTERSTATE COMMERCE.

This brings us to the question of whether a carrier can accept anything other than money in consideration for the transportation of passengers or property.

So far as we have been able to ascertain and understand the Interstate Commerce Act, the Rulings of the Interstate Commerce Commission and the decisions of this Honorable Court, we have formed a conclusive opinion that a carrier engaged in the transportation of passengers and property in interstate commerce is forbidden to receive as payment for an interstate journey, anything other than money.

This doctrine is fully supported by numerous cases.

Louisville & N. R. R. Co. vs. Mottley, 219 U. S., 467; 55 L. Ed., 297.

Chicago etc. R. Co. vs. United States, 219 U. S., 486; 55 L. Ed., 305.

American Exp. Co. vs. United States, 212 U. S., 522; 53 L. Ed., 635.

United States vs. Hocking Valley R. Co., 194 Fed., 234.

State vs. Union P. R. Co., 87 Neb., 29; 126 N. W., 859.

## INTERSTATE COMMERCE ACT.

Under Section 6 of the Interstate Commerce Act the carriers must show

> "all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges or the value of services rendered to the passenger, shipper or consignee. * * * * Nor shall any carrier charge or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariff than the rates, fares and charges which are specified in the tariff filed and in effect at the time, * * * * nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

## RULING OF INTERSTATE COMMERCE COMMISSION.

By Conference Ruling 207, the Interstate Commerce Commission held:

> "Nothing but money can be lawfully received or accepted in payment for transportation subject to the Act, whether of passengers or property, or for any service in connection therewith, it being the

opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates and fares in effect at the time, precludes the acceptance of services, property, or any other payment in lieu of the amount specified in the published schedules."

## DECISIONS OF SUPREME COURT OF UNITED STATES.

The Supreme Court of the United States in the case of Louisville & Nashville R. Co. vs. Mottley, 219 U. S. 467; 55 L. Ed., 297; held that a carrier cannot accept as consideration for the transportation of passengers or property anything but money, so as to give all the same opportunity and have the equal benefit.

And in Louisville & Nashville R. Co. vs. Mottley (Supra), the Court said:

> "In our opinion, after the passage of the commerce act, the railroad company could not lawfully accept from Mottley and wife any compensation "different" in kind from that mentioned in its published schedule of rates. And it cannot be doubted that the rates or charges specified in such schedule were payable only in money. They could not be paid in any other way, without producing the utmost confusion, and defeating the policy established by the acts regulating commerce. The evident purpose of Congress was to establish uniform rates for transportation, to give all the same opportunity to know what the rates were, as well as to have the equal benefit of them. To that end the carrier was required to print, post and file its schedules and to keep them open to public inspection. No change could be made in the rates embraced by the schedules except upon notice to the Commission and to the public. But an examination of the schedules would be of no avail and

> would not ordinarily be of any practical value if the published rates could be disregarded in special or particular cases by the acceptance of property of various kinds, and of such value as the parties immediately concerned chose to put it, in place of money for the services performed by the carrier."

In the case of Chicago, etc. R. Co. vs. United States, 219 U. S., 486; 55 L. Ed., 305: it was held that a carrier could not accept advertising in payment of transportation in interstate commerce. As was said in that case:

> "The facts in the present case show how easily, under any other rule, the Act can be evaded and the object of Congress entirely defeated. The Legislative Department intended that all who obtain transportation on interstate lines should be treated alike in the matter of rates, and that all who avail themselves of the services of the company (with certain specified exceptions) should be on a plane of equality. Those ends cannot be met otherwise than by requiring transportation to be paid in money, which has a certain value, known to all, and not in commodities, or *services or otherwise than in money.*" (Italics ours.)

## CAN TARIFFS IMPLY PRIVILEGES.

It cannot be said that by implication the fare of the caretaker is included in the charge for the stock, for

FIRST: This would be in violation of Section 6 of the Interstate Commerce Act. That Section, as heretofore stated, requires the carrier to expressly *specify* in the tariff all privileges granted in the transportation of passengers or property.

SECOND: Such a construction would not treat all shippers alike. There are a number of cases where no

caretaker accompanies the stock. In fact a caretaker does not accompany the stock in 90% of the shipments. It would open the door wide to fraud. The services of each person accompanying shipments would not be the same. They would not be on the same plane.

Under the Elkins Act and under the Hepburn bill, it has been held that the carrier must give notice in the tariff of free cartage, literage, ferriage, or any other accessorial service that will be furnished, as well as of any allowance that will be made to shippers who furnish transportation facilities or service.

United States vs. Chicago, etc. Co. 148 Fed. 646, 26 LRA (N. S.) 551; 84 C. C. A. 324; 156 Fed. 558, 212 U. S. 563; 53 L. Ed. 653; 29 Sup. Ct. Rep. 689.

Victor Fuel Co. vs. Atchison, etc. Co. 14 I. C. C. 120.

Mitchell Coal Co. v. P. R. R. 230 U. S. 260; 57 L. Ed. 1472, 1478.

As it was not expressly provided in the tariff that caretakers should accompany the stock free: for Chatman to have been legally upon the train he was there solely by virtue of the provision of Section 1 of the Act. If he was there by virtue of Section 1 of the Act, he would come within the ruling of the Thompson case.

**DID THE CIRCUIT COURT OF APPEALS ERR IN DISTINGUISHING THE THOMPSON CASE FROM THIS CASE ?**

We think that the opinion of this Honorable Court in the case of Charleston, etc. R. R. Co. vs. Thompson (Supra), fully covers in this case, and serious error was committed by the Circuit Court of Appeals in its distinction between the Thompson case and this case.

That case expressly held that a carrier must collect the charges shown in the tariff, or issue free passes only to

those specified in the Act, holding that all passes issued to the excepted classes were free.

The opinion in our case says:

> "That it was the carrier's duty to issue transportation to shippers or caretakers while accompanying the stock in consideration of the services rendered."

In the Thompson case the point was raised that the transportation was issued upon consideration of the services of the employee. The Court is reply said:

> "The railroad was under no obligation to issue the pass. It may be doubted whether it could have entered into one, for then the services would be the consideration for the duty and the pass and by Section 6, it was forbidden to 'charge a greater or less or different compensation' for the transportation of passengers from that shown in its published rates."

By reference to the Thompson case we also find the following language:

> "After the writ of error was taken it modified its statement so as to say that the jury might infer that the pass was issued for value. But no such issue was before the jury, as the defense was excluded altogether, and apart from other objections we are of the opinion that the change does not help the decision."

The above quotation applies with equal force to the facts in our case. It is very apparent from what has been said that the trial court committed error in not submitting the issues of plaintiff-in-error, and in charging the jury that

Chatman was a passenger for hire; and the opinion of the Circuit Court of Appeals is in error in holding as a matter of law that Chatman was a passenger for hire.

## WAS PLAINTIFF RIDING ON THE TRAIN AT THE TIME OF THE DERAILMENT IN VIOLATION OF THE LAW?

Assuming that Chatman was not on the train under the authority and by virtue of the exception of Section 1 of the Interstate Commerce Act, as to those to whom free passes may be given, and assuming that the release signed by Chatman releasing the railroads from liability was not valid, and assuming that the plaintiff was riding on the train in violation of the law, that is, without having paid his fare, and assuming that the train was derailed by the negligence of the defendant. Can plaintiff recover?

In other words, can plaintiff recover damages while engaged in an act, which act is in violation of the law and prohibits the very act which plaintiff was doing at the time he was injured?

The defendant in its answer set up the defense that the plaintiff was riding in the said car without its knowledge or consent, and that any drover's pass issued or attempted to be issued by the Pennsylvania Railroad Company was in violation of the tariff, which had been filed with the Interstate Commerce Commission, and was therefore in violation of the Statute passed by the Congress of the United States, to-wit:

> An Act entitled an Act to Regulate Commerce, approved Feb. 4th, 1887, and amended by certain Acts, to-wit: An Act approved June 29th, 1906, and An Act approved April 13th, 1908; and an Act approved Jan. 25th, 1909; and an Act approved June 8th, 1910, and certain amendments, thereunto

made, the whole being commonly known as the Act to Regulate Commerce (Rec. pp. 6, 7 and 8).

The rate of freight on a car of horses from Jersey City, New Jersey, to Hertford, North Carolina, was $76.50. This rate was duly filed and published with the Interstate Commerce Commission . (See Record pages 20 to 25, inc.) Under this rate it was expressly provided that free or reduced transportation should not be issued for shippers or caretakers in charge of live stock shipments (see Record page 26). The rate of freight for this shipment, named in the bill of lading, from Jersey City, N. J., to Hertford, N. C., was $76.50. Plaintiff testified (page 15) that he paid no freight, got no paper from anyone except the coupon, set out on page 13 of the Record, and that he signed the contract and the coupon, got in the car with the stock, in order to feed and water them. (See page 15).

## PROVISIONS OF INTERSTATE COMMERCE ACT.

Section 6 of the Act to Regulate Commerce provides, among other things, as follows:

> "Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for transportation of passengers or property or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, *nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs.*" (Italics ours).

The tariff in effect at the time this shipment was made, and under which the shipment necessarily moved, provided that free transportation should not be issued to shippers or caretakers of live stock; and further provided that they must pay full fare. (Rec. p. 26).

Although by Section 1 of the Act to Regulate Commerce, carriers are permitted to give free transportation to shippers or caretaker of live stock, it is not compulsory upon the carriers to give the excepted classes free transportation, and when the carrier filed a tariff which provided that shippers and caretakers of live stock should pay full fare, it was necessary for them to pay the fare specified in the tariff. And by the tariff at the time this shipment moved, shippers and caretakers of live stock, in order to accompany the live stock, had to pay full fare. After the tariff was filed with the Commission any contract for the free transportation of caretakers of live stock was in violation of the Act to Regulate Commerce.

## CONSENT TO CARRY FREE COULD NOT BE GIVEN.

The carrier could not consent to carry him free, and neither the officers nor the agents of the carrier had the power to waive the provisions of the tariff, for the tariff was in full force and effect until withdrawn and a new tariff filed in its place, with the consent of the Interstate Commerce Commission.

Sec. 6, Interstate Commerce Act.

By the Act of February 19th, 1903, known as the Elkins Act, amending Act of 1887 (32 Stat. at L. P. 847; Chap. 708, U. S. Comp. Supp. 1911, page 1309), it is made

> "Unlawful for any person, persons or corporation to offer, grant or give, or to solicit, accept or receive any rebate, concession or discrimination, in respect of the transportation of any property in in-

terstate or foreign Commerce by any common carrier, subject to said Act to Regulate Commerce, and the Acts amendatory thereto, whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariff published and filed by such carriers, as is required by said Act, to Regulate Commerce, and the Acts amendatory thereto, or whereby any other advantage is given or discrimination practiced."

## PLAINTIFF OBTAINED ADVANTAGE PROHIBITED BY ACT.

In this case Chatman obtained an advantage other than that afforded others and also obtained a privilege that was not specified in the tariff, but to the contrary such privilege was absolutely prohibited.

As was said in the case of Chicago & Alton R. Co. vs. Kirby, 225 U. S., 155; 56 L. Ed., 1033, 1037:

> "An advantage accorded by special agreement which affects the value of the service to the shipper and its costs to the carrier should be published in the tariffs, and for a breach of such contract, relief will be denied, because its allowance without such publication is a violation of the Act. It is also illegal because it is an undue advantage, in that it is not open to all in the same situation."

## PRESUMED TO KNOW CONDITIONS OF TARIFF.

A shipper is presumed to know the published rates, schedules and provisions of tariffs filed with the Interstate Commerce Commission.

Chicago, etc., R. Co. vs. Kirby (Supra).

Adams Ex. Co. vs. Croninger, 226 U. S., 491: 57 L. Ed. 314, 321.

Texas, etc., R. Co. vs. Mugg, 202 U. S., 242; 50 L. Ed. 1011.

Ill. Cent. R. Co. vs. Henderson Elevator Co., 226 U. S. 441; 57 L. Ed., 290.

Kas. City R. Co. vs. Carl, 227 U. S., 639; 57 L. Ed., 683; 33 Sup. Ct. Rep., 391.

M. K. & T. R. Co. vs. Harriman, 227 U. S., 657; 57 L. Ed., 690; 33 Sup. Ct. Rep., 397.

Chicago R. I. & P. R. Co. vs. Cramer, 232 U. S., 490; 34 Sup. Ct. Rep. 383.

**CONDITIONS IN TARIFF CONCLUSIVE AGAINST ALL.**

As was said by the Supreme Court of the United States in the case of Atchison, etc., R. Co. vs. Robinson 233 U. S., 173; 58 L. Ed. 901, 34 Sup. Ct. Rep. 556,558, after citing a number of cases:

> "We regard these cases as settling the proposition that the shipper as well as the carrier is bound to take notice of the filed tariff rates, and that so long as they remain operative, they are conclusive as to the rights of the parties, in the absence of facts or circumstances showing an attempt at rebating or false billing.
>
> Great Northern Railroad Co. vs. O'Connor, 232 U. S., 508, 34 Sup. Ct. Rep. 380. To give to the oral agreement upon which the suit was brought the prevailing effect allowed in this case by the charge in the trial court, affirmed by the judgment of the Supreme Court of the State would be to allow a special contract to have binding force and effect though made in violation of the filed schedules which were to be equally observed by the shipper and carrier. If oral agreements of this character can be sustained,

> then the door is open to all manner of special contracts, departing from the schedules and rates filed with the Commission. Kansas City, etc. R. R. Co. vs. Carl, 227, U. S. 652; 57 L. Ed. 688; 33 Sup. Ct. Rep. 391. To maintain the supremacy of such oral contracts would defeat the primary purpose of the Interstate Commerce Act, so often affirmed in the decisions of this Court, which is to require equal treatment of all shippers, and the charging of but one rate to all, and that the one filed as required by the Act."

In the above case the Supreme Court of the State held that the oral contract was not binding unless it was affirmatively shown that the written agreement, based upon the filed schedules was brought to the knowledge of the shipper, and its terms assented to by him. With reference to this ruling, the Court said:

> "This ruling ignored the terms of shipment set forth in the schedules and permitted recovery upon the contract made in violation thereof, in a case where there was no proof that there was an attempt to violate the published rates by a fraudulent agreement showing rebating or false billing of the property and no circumstances which would take the case out of the rulings heretofore made by this court, as to the binding effect of such filed schedules, and the duty of the shipper to be bound thereby, in the absence of the exceptional circumstances to which we have referred."

We can reach only one conclusion in the case before us, by what was said by the Supreme Court in the Robinson case. That is, there can be no recovery where the contract is in violation of the published schedules, and it cannot be doubted that such was the case when Chatman traveled

without paying fare, and the tariff provided that free transportation should not be given to caretakers of live stock.

We may sum up the case before us as follows:

1. The tariff provided that free transportation was not to be given to caretakers of live stock.

2. The shipper as well as the carrier was bound to take notice of the filed schedules.

3. That the provisions in the tariff are conclusive as to the rights of the parties in the absence of an attempt at rebating or false billing.

4. That there was no proof of an attempt to rebate or false bill the shipment.

5. That the free carriage of Chatman upon the train was in violation of the filed schedules.

6. That such a contract for the free transportation of Chatman was therefore in violation of the Interstate Commerce Act.

7. That there can be no recovery upon a special contract, made in violation of the filed schedules and in violation of the Act to Regulate Commerce.

## IS CHATMAN ENTITLED TO RECOVER FOR INJURIES SUSTAINED WHILE RIDING ON THE TRAIN IN VIOLATION OF LAW?

In the case of Southern R. Co. vs. Wilcox, 99 Va., 394, 408; 39 S. E. 144, 147, the Supreme Court of Appeals of Virginia, said:

> "The plaintiff's shipments were interstate freight and must be governed by the Interstate Commerce Act. That statute prohibits an interstate carrier from contracting for or collecting a less rate of freight on interstate shipments than that speci-

> fied in the schedules of rates in force at the time, and which are required to be printed and kept at all stations for the inspection and use of the public. The evidence, as before stated, tended to show that the alleged contract was in violation of the Act. If it was, there could be no recovery upon it. The general rule of law being that a contract made in violation of law is void, and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover. Camp vs. Bruce, 96 Va. 321; Hancock vs. R. R., 145 U. S., 416; 5 Rob. Pr. 409, etc. There is no reason why contracts in violation of the Interstate Commerce Act should not be governed by the general rule, and the courts which have passed upon this question have generally so held. See F. & W. Ry. Co. vs. Burdick, (Ga.); 21 S. E., 995; S. R. R. Co. vs. Harrison (Ala.); 24 Southern 552; C. R. I. S. A. and A. R. R. vs. Clements, 49 S. W., 193; Wight vs. U. S., 167 U. S., 513."

The Supreme Court of the United States in the case of Louisville & N. R. Co. vs. Motley, 219 U. S., 467; 55 L. Ed. 297, 304, cites with approval Pomeroy on Contracts:

> "In Pomeroy on Contracts, Sec. 280, (Specific Performance) after observing that an illegal contract cannot be made the basis of any judicial proceeding; and that no action in law or equity could be maintained upon it, it was said: 'This impossibility of enforcement exists, whether the agreement is illegal in its inception, or whether being valid when made, the illegality has been created by some subsequent statute."

In the case of Louisville & N. R. Co. vs. Motley (Supra), the carrier had entered into a contract to issue annual passes for life in consideration of a release of a claim for

damages, and although the contract was entered into prior to the Act of June 29th, 1906, it was held that the contract was unenforceable on account of the prohibition of Section 6 of said Act, against demanding, collecting or receiving *"a greater or less or different compensation"* than that set forth in the tariff on file with the Commission.

In Mayes vs. Cherokee, etc. Co. 58 Kan., 712; 51 Pac. 215, the Court said:

> "The controversy arises here directly between the parties to an illegal contract, and the plaintiff seeks a recovery through and under that contract. The parties voluntarily entered into the contract, and they must be held to have had knowledge that in doing so, they were violating the law."

And further,

> "Courts will not aid a person whose cause of action, either upon his own showing or otherwise, appears to arise ex turpe causa, or from transgression of positive law. They do not adopt this policy for the purpose of protecting a defendant but from a determination not to assist such a plaintiff. Den. vs. Shotwell, 24 N. J. L. 789."

The case of Melody vs. Great Northern R. Co., 25 S. Dak., 606; 127 N. W., 543, held that under the Interstate Commerce Act a person dealing with a carrier is as effectually bound by the law and the orders of the Commerce Commission, as to passenger tariffs, as is the carrier itself, and neither is estopped to assert the illegality of a contract made in violation of the Act and orders of the Commission.

In that case it was held that a ticket issued to a passenger by a carrier in violation of the terms and conditions of the orders of the Interstate Commerce Commission, conferred no right to passage and the conductor of the train

was not required to accept the ticket, and a passenger might be ejected without making the carrier liable in damages.

So in this case it was testified that Chatman paid no fare, had no ticket, and his only right to be on the train was a coupon issued by the Pennsylvania Railroad Company. Conductor Woodard testified that he did not see him and that no one offered to pay any fare for Chatman. Had the conductor seen him, he would have been justified in ejecting him unless full fare was paid. (Rec. p. 26). So the proposition holds when Chatman was injured. There can be no liability on the part of the carrier for injuries sustained when he was on the train in violation of the law.

The Court in the case of Duncan vs. Maine Cent. R. Co. 113 Fed. 508, said:

> "The plaintiff maintains that the giving of the pass was a breach of the federal statute in reference to interstate traffic. It may be well questioned whether there is enough in the Record to bring the case within those statutes, but independently of this there are several answers to the proposition. Of course, if the foundation of the right against a common carrier were contract, it would be apparent that, under the familiar maxims of the law, no action would lie, because even though the plaintiff is not subject to any penalty imposed by the Interstate Commerce Statutes, he would be in pari delicto. Indeed, he would be the party, especially enjoying the benefit of the combination in violation of the law. It is not, however, necessary to go into the question whether the fact that an action against a common carrier who has actually received into his custody a passenger or merchandise lies in contract, as well as in tort, establishes that the substantial relation is

contractual or whether the right against the carrier is fundamentally based upon the custom of the realm, as commonly said; precisely as a right against a public officer or a quasi public officer is so based, so that in the absence of a bill of lading or its equivalent the assumption arises only because it is implied from the acceptance of the custody of the passenger or the goods. It is the undoubted law that the maxims with reference to persons in pari delicto are not limited to causes ex contractu, and that no suit can be maintained whenever it springs from an illegal transaction to which the plaintiff was a party, and which transaction is necessarily a portion of his case. Pol. Cont. (6th Ed.) 363.

In the present suit, the plaintiff could not show that he was legally on the defendant's train, without exhibiting this pass in his pleadings, or in his proofs. No exoneration or contribution between joint tort feasors or between persons who have agreed together in violation of law can arise out of the joint tort or the subject matter of the agreement. But the case takes on even more concrete aspect. Rejecting the pass as void, the plaintiff puts himself in the position of one who was on the train of the defendant without its permission, and without intention of paying the fare which would entitle him to be regarded as a passenger. The consequence, therefore, of the plaintiff putting himself in that position, is to leave him as an unauthorized intruder, and to place him outside of those rules of law, which give protection against the mere negligence of the servants of a common carrier."

The conductor had no authority to waive the provisions in the tariff, and permit Chatman to ride free, even though he knew Chatman was in the car, which was denied by the conductor.

Illinois C. R. Co. vs. Messina (decided March 6, 1916), 36 Sup. Ct. Rep. 368.

Vassor vs. Atlantic Coast Line Railway Co., 142 N. C. 68; 9 Am. & E. Cases 535.

In the case of B. & O. R. Co. vs. Hamberger, 155 Fed. 649, Waddill, D. J., after quoting a portion of Section 6 of the Act to Regulate Commerce, held :

> "This language is clear and explicit, and its meaning too plain to admit of serious question or doubt as to what was intended by Congress. The published schedule filed with the Commission must show 'all privileges or facilities granted or allowed.'"

Contracts which are made in violation of law are void. Authorities are numerous to support this proposition.

In the case of Miller vs. Armour, 145 U. S., 421; 12 Sup. Ct. Rep. 884.. 36 L. Ed., 759; Mr. Justice Brewer for the Court, at p. 426 of 145 U. S., at p. 886, 12 Sup. Ct. Rep. and p. 762 of 36 L. Ed. said:

> "The general rule of law is that a contract made in violation of a statute is void, and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover. Pollock's principles of Contracts, pp. 253 to 260. Penn vs. Bonner, 102 Ill., 523; Alexander vs. O'Donnell, 12 Kans. 608; Gunter vs. Leckey, 30 Ala. 591; Kennedy vs. Cockrane, 85 Me., 594; Bank of U. S. vs. Owens, 2 Pet. 527, 539; 7 L. Ed. 508; Panghon vs. Westlake, 36 Iowa, 546, 549; Harris vs. Runnells, 12 How. 79, 84; 13 L. Ed. 901. In Bank vs. Owens this Court said 'There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal.'"

Justice Brewer then states some exceptions to the doctrine, and concludes as follows:

> "When the statute is silent and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void."

The undertaking to do that which is forbidden by law is void; whether the acts done or undertaken be malum in se or malum prohibitum.

B. & O. R. Co. vs. Hamberger (Supra).

The plaintiff acknowledges that he had no ticket, that he did not pay for a ticket, therefore he was either,

1. On the train without the authority of contract, in which case he was a trespasser, and therefore could not recover any damages unless the injury was willful and wanton, and there was no allegation or proof that the injuries were sustained on account of willful or wanton conduct; or

2. He was suing to recover for injuries sustained on account of the breach of the contract of safe carriage, which was in violation of the law.

The Supreme Court of the United States in the case of Pullman Palace Car Company vs. Transportation Co., 171 U. S., 148; 43 L. Ed. 108, held that an action for damages will not lie when based upon an illegal contract, saying:

> "The principle is not new, but on the contrary, it has been frequently announced, commencing in cases considerably over a hundred years old. It was said by Lord Mansfield in Holman vs. Johnson, 1 Cowper, 341, decided in 1775, that 'the object that a contract is immoral or illegal as between the plaintiff

> and defendant sounds at all time very ill, in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded on general principles of policy, which the defendant had the advantage of, contrary to real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: Ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.' "

In Oscanyan vs. Arms Co., 103 U. S., 261; 26 L. Ed. 539, the Supreme Court held that an action for damages for the breach of a contract, which was in violation of law, and contrary to public policy, would not lie, and sustained the lower court, which had non-suited the plaintiff.

The doctrine as laid down by numerous courts, if not all, is that an action for damages will not lie, if the plaintiff to establish his claim must rely on an illegal transaction.

It is unnecessary to encumber this brief with the citation of more authorities as they all reach the same conclusion.

An action by a passenger for injuries received on account of the negligence of the carrier is an action of tort arising on contract.And the plaintiff has based his action in this case on the ground that he was a passenger on the train travelling on a drover's pass (see complaint, Record pp. 1 and 2).

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit has failed to note the application of the Interstate Commerce Act to the case at bar. They have failed to discuss the main questions involved, viz :

1. That Chatman was riding on a free pass granted under the exception to Section 1 of said Act.

2. That nothing except money can be accepted as consideration for the transportation of passengers and property in interstate commerce.

3. That there can be no right of action based on a contract made in violation of law.

## CONCLUSIONS.

To sum up, we say that a person who is riding on a train by means of a ticket or pass under which he has no right to transportation, is not a passenger but a trespasser, and the railroad company is not liable for injuries sustained by reason of negligence, and recovery can be had only in case the injuries were wilfully or wantonly inflicted, and there was no allegation or proof that the injuries were sustained by willful or wanton conduct.

Therefore, the plaintiff was,

1. Either riding upon the train upon authority of a free pass which was a gratuity, and the defendant had the right to attach thereto such conditions as it saw proper, and the plaintiff having signed the release set out on pages 19-20 of the Record, cannot recover for injuries; or

2. That the contract with the plaintiff and the Pennsylvania Railroad Company was in violation of law, and there can be no action for damages based thereon.

Respectfully submitted,

JOHN H. SMALL,
W. B. RODMAN,
C. M. BAIN,
J. KENYON WILSON,

Attorneys for
Norfolk Southern Railroad Company,
Plaintiff in Error.

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# IN THE
# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 192.

NORFOLK SOUTHERN RAILROAD COMPANY,
Plaintiff in Error

v.

W. C. CHATMAN,
Defendant in Error

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FOURTH CIRCUIT

## SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR

JOHN H. SMALL,
W. B. RODMAN,
C. M. BAIN,
J. KENYON WILSON,
Attorneys for Plaintiff in Error.

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Plaintiff takes an anomalous position by stating that by pleading the exceptions to section 1 of the Interstate Commerce Act, he did not claim that he was riding as a party coming within the excepted classes, but only to answer the

contention of the defendant that he was riding in violation of law.

If he answered the contention that he was riding in violation of law, by especially pleading the exceptions, only one inference can be drawn, and that is that he was lawfully on the train as coming within the excepted classes.

## DOCTRINE OF FEDERAL AND NOT STATE COURTS TO BE FOLLOWED.

Plaintiff in his brief has claimed that under the law of New Jersey, the place of contract, and the law of North Carolina, the place of injury, a release from liability would be void as to a gratuitous passenger.

He does, however, concede that under the doctrine of the Federal Courts, if plaintiff was a gratuitous passenger, he would be bound by the release.

Northern Pacific R. R. Co. v. Adams, 192 U. S. 440, 40 L.Ed. 513, 24 Sup. Ct. Rep. 408.

It is unnecessary to discuss the question of the doctrine which is to be followed.

The plaintiff was travelling in interstate commerce.

The construction of the Act to Regulate Commerce was directly involved.

The case was tried by the District Court of the United States.

The consequent rights and liabilities of the parties depend upon Acts of Congress.

Therefore the doctrine applied in Federal tribunals is to be followed.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L.Ed. 314.

Seaboard Air Line v. Horton, 223 U. S. 492; 58 L.Ed. 1062.

L. S. & M. S. v. Prentice, 147 U. S. 101; 38 L.Ed. 97.

New York Cen. R. Co. v. Lockwood, 17 Wall. 357; 21 L.Ed. 627.

C. N. O. & T. P. Co. v. Rankin, 241 U. S. 319; 60 L.Ed. 1022.

New York Cen. R. Co. v. Beaham, decided by United States Supreme Court, Dec. 4, 1916.

We therefore do not see the necessity of discussing the doctrines of the various State Courts. We will try to confine ourselves to the rule which is to be followed in Federal jurisdictions.

We recognize, and are thoroughly familiar with the doctrine laid down in the so-called Lockwood case.

We are willing to concede that under the doctrines of this Honorable Court, if the plaintiff was a passenger for hire, the release is invalid.

Therefore the question is, was the Plaintiff a Gratuitous Passenger? We have carefully considered the question and have been able to answer it only in the affirmative.

The Lockwood Case, Supra, was decided years ago, in 1873, long before the passage of the Interstate Commerce Act, and particularly the Hepburn Act of June 29, 1906, the construction of which was so clearly set out in the case of

Charleston etc. R. Co. v. Thompson, 234 U. S. 576; 58 L.Ed. 1476.

We have necessarily concluded that the question should be answered by reference to the terms of the Act itself and the decisions of this Honorable Court construing those portions of the Act here involved.

The only difference in the various live stock contracts is the released valuation of the stock, otherwise the terms of the live stock contracts are the same.

On page 6 of the plaintiff's brief we find the following statement: "Upon the condition that he or his representative accompany the shipment, performing himself the onerous duties imposed by the statute upon the carrier."

The question, which presents itself, is, Do the terms of the live stock contract relieve the carrier of the obligation placed upon it by the Twenty-Eight-Hour Law, Section 4386, U. S. Compiled Statutes, 1901? There was no proof that Chatman fed and watered the horses. Even though he accompanied the stock, did not the obligation of the carrier, as provided by Statute, remain? Could that be a consideration for the transportation of a person?

Plaintiff, further on page 6 of his brief says that the Courts are divided as to what constitutes a consideration in such a contract. None of the positions set up by plaintiff claim money as a consideration. Our contention is that the consideration claimed by the plaintiff is contrary to the provisions of the Interstate Commerce Act, which provides that nothing but money can be accepted in consideration for transportation.

Louisville & N. R. Co. v. Mottley, 219 U. S. 467; 55 L.Ed. 297.

Chicago etc. R. Co. v. United States, 219 U. S. 486; 55 L.Ed. 305.

New York Cen. R. Co. v. Gray, 239 U. S. 583; 60 L.Ed. 451.

The doctrines announced in the Mottley Case, Supra, that nothing except *money* can be accepted as consideration for the transportation of passengers and property, was recently followed in the case of New York etc. R. Co. v. Gray, Supra.

## PLAINTIFF WAS A GRATUITOUS PASSENGER UNDER PROVISIONS OF INTERSTATE COMMERCE ACT.

Plaintiff is no doubt correct in the statement that Congress did not create a new class of "free passes" by the passage of "The Hepburn Act." But by the passage of that Act Congress did say that all persons travelling on trains must pay regular tariff fare, in money, with the exception of a few specifically named classes, to whom "free passes" could be issued. To do away with the alleged evil referred to in plaintiff's brief, the law was passed to prohibit the carriage of passengers, without the payment of fare in money, save those coming within the exception. And they were to be carried free, or upon the payment of fare in money and not otherwise. We do not intend to go into the purpose and spirit of the legislation. The law is plain and specific. There can be only one interpretation and that is that all passes, tickets, coupons or other evidences of transportation given to parties are free passes under the Interstate Commerce Act unless regular tariff fare is paid.

Congress no doubt was well informed at the time of the passage of the Act that drover's passes were issued by railroads, otherwise they never would have made the exception. But Congress also, no doubt knew that such passes were free passes, and made the exception, granting permission to railroads to give free passes to drovers. The Act did not permit reduced fare, or permit carriers to give transportation to drovers or shippers of live stock upon consideration of services rendered. Congress only permitted "free" transportation to be given. By the act all parties must pay tariff rate, and if there was no exception as to free passes for drovers, they could only travel upon payment of fare in money. Congress necessarily contemplated the pass as being what it was called, "free."

Charleston etc. R. Co. v. Thompson, 234 U. S. 576; 58 L.Ed. 1476.

Congress permitted free passes to be given to certain parties. But Congress did not enact that a person injured while travelling on a free pass, could not recover for such injuries. By the Act parties coming within the excepted classes and travelling on free passes are gratuitous passengers. If they sign a release they cannot recover, if they do not they are licensees. And there is a difference in the duty owed a licensee and a passenger for hire. The duty owed a passenger is higher than that owed a licensee, and the allegations of the complaint were a breach of duty owed a passenger for hire and the judge charged the jury that the plaintiff was a passenger for hire and that railroads owed passengers a very high degree of care. We therefore submit that by the theory on which the case was tried there was grave error to the damage of the defendant.

Congress has said that any consideration, other than money for transportation of passengers or property is illegal.

If the consideration for the drover is to be included in the fare paid for the transportation of the live stock the tariff must so specify. There can be no inference.

See Section 6 of Interstate Commerce Act, where it is specifically stated.

"The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the Classification of freight in force, and shall also state *separately* all terminal charges, storage charges, icing charges, and all other charges which the commission may require, *all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges,* or the value of the service rendered to the passenger, shipper or consignee."

See Southern R. Co. v. Prescott, 240 U. S. 632; 60 L.Ed. 836, where it is said,

"It is also clear that, with respect to the service governed by Federal statutes, the parties were not at liberty to alter the terms of the service as fixed by the filed regulations."

And further

"No carrier may extend any privileges or facilities, save as these have been duly specified."

We also refer to the long line of decisions cited in the opinion in the above case as supporting this doctrine. We seriously contend that a passenger fare cannot be included in a lump sum for the transportation of freight.

And we question the legality of a passenger fare being shown in freight tariffs.

Plaintiff takes the position that the exception as to drover's passes only referred to the return movement. We do not see the authority for such reasoning.

The wording is "to necessary caretakers of live stock," etc. To us it is clear that the necessity for a caretaker of live stock would be to accompany the stock, and not the returning after stock has reached the destination.

Plaintiff then admits that the return movement would be free in the strictest sense. Such a construction is without merit. The contract would have to be considered as a whole. Either both the transportation with the stock and return would be free and gratuitous or for consideration. The release signed by the drover would either be valid both going and returning or it would be void in both instances.

Plaintiff is in grave error in saying that defendant company construed the Act as he has, by making the provision in its tariffs, (Record p. 26).

We can only interpret and construe said provision to include both going and returning. The words are explicit. "In charge" can only mean while accompanying the stock.

## THOMPSON CASE MUST BE CONTROLLING.

In the Thompon case (Supra) this Honorable Court construed that portion of the Act here in question. The identical question was involved, that is are persons coming within the excepted classes, free passengers or passengers for hire. We are content to rest on that decision.

Plaintiff says that in the Thompson case the court was determining the rights of a gratuitous passenger, in this case of a passenger for hire.

What is the consideration for the transportation? All of the claims of plaintiff as to what constituted the consideration, would be an illegal consideration, and an illegal consideration is equal to no consideration at all.

Plaintiff claims defendant was relieved of the obligation placed by Twenty-Eight-Hour Law. Plaintiff accompanying the stock did not relieve the carrier of the obligation placed by statute. And that would not in any sense be a valid consideration.

Plaintiff also contends

"It is the right of the shipper to accompany his stock at his option, and the corresponding duty of the carrier to provide, in his schedule of tariff, for such transportation."

If we should grant that such was the duty of the carrier, we could answer, easily, by saying that the remedy is to go to the Interstate Commerce Commission, and not to any court. If there is no provision in the tariff then the transportation cannot be furnished.

Southern R. Co. v. Reid, 222 U. S. 424; 56 L.Ed. 257.

Southern R. Co. v. Reid, 222 U. S. 444; 56 L.Ed. 263.

Southern R. Co. v. Prescott (supra).

We however cannot conceive how it can be contended that a shipper has the right to accompany his stock. Is it not out of the question to claim that a carrier must permit persons to travel on freight trains? It is a matter of common knowledge that the hazard of travelling on freight trains is greater than on passenger trains. Freight trains stop at many stations, they are made up of many cars, which must be dropped at various stations. The shifting and the waiting and the handling of freight trains increase the hazard.

As we understand it, passenger trains are for passengers and freight trains for freight.

Plaintiff says that a carrier has the right to charge different rates to different classes of passengers, provided only there be no discrimination between passengers of the same class, and further claims there is no discrimination here, as every shipper of the same class was entitled to the same privileges given the plaintiff.

We ask, could such a privilege have been demanded by anyone, when there was no tariff provision to cover.

Plaintiff also says that a caretaker of live stock should not be charged the same rate of fare as a passenger de luxe. We concur in the statement, but would also add, that the fare for a caretaker of live stock travelling in a freight train should be more, as the risk is greater.

Plaintiff further says that there are appended to the Hepburn Act, not a *single exception*, but eight exceptions.

Maybe stupidity should be confessed on our part, but we can only find one exception, as to passes, which exception refers to the eight classes, each class being grouped together.

Plaintiff on page 15 of brief says that he does not come within the contemplation of the exception and is a passenger for hire. We need only answer by saying that nothing regarding rates, fares and charges for transportation of passengers and property is outside of the Interstate Commerce Act.

Plaintiff further says that Thompson Case is not an authority for this case. As we read the opinion of the Thompson case, it construes and interprets the entire exception to the so-called anti-pass provision of the Hepburn Act.

By reference to the record and facts we think plaintiff is in error in the statement on page 16 of brief.

"The schedule further contemplates and provides for a caretaker."

We find nothing in the schedule providing for the transportation of a caretaker.

Plaintiff next asks the following question:

Can a carrier lawfully impose such a release upon a caretaker when same has not been provided for in its schedule of rates?

The free pass is given under and by virtue of plaintiff coming within the excepted class of section 1 of the Act. It was not necessary to file a tairff under which plaintiff could be transported free. Therefore it was not necessary for the release to be filed as a part of any tariff.

We again find on page 18 of plaintiff's brief that the schedule provided that the shipment must be accompanied by a caretaker. We have searched the schedule from end to end, and over and over and we have been unable to find any such provision.

## ILLEGAL CONTRACT CANNOT BE BASIS OF RECOVERY.

The fact that plaintiff had a drover's pass or was seen on train by defendant's servants does not make plaintiff a passenger.

In Ill. Cen. R. Co. v. Messina, 240 U. S. 395; 60 L.Ed. 709, it was expressly held that a person riding on a tender of an interstate train by permission of the engineer, without payment of fare, is unlawfully on the train in violation of the Hepburn Act and could not recover for injuries received in wreck of the train.

A person who rides on a train by means of a ticket or pass under which he has no right to transportation is not a passenger, but a trespasser and the railroad company is not liable for injuries sustained by reason of negligence, and recovery can be had only in case the injuries were wilfully and wantonly inflicted.

Van Auken v. Michigan Cen. R. Co., 182 Mich. 331.

Vassor v. Atlantic Coast Line R. Co., 142 N. C. 68.

The case of Southern Pac. R. Co. v. Schuyler 227, U. S. 601, cited by the plaintiff is no authority for this case. That case was determined by the local law of Utah, where the accident occurred, and under that law a liability existed.

## CONCLUSIONS.

We earnestly insist that plaintiff was

1. Either a gratuitous passenger and the release was valid, or

2. He was on the train in violation of law and therefore cannot recover.

Each of these positions are sound, and plaintiff comes under one or the other. We are inclined to the belief that

he was a gratuitous passenger and the release executed was valid.

Plaintiff seems unfortunate in his arguments, for when arguing against one position he puts himself in the other, and vice versa. If plaintiff's logic is correct that he was not a gratuitous passenger he shows that he is on the train in violation of law, and the rules and regulations of the company, and was therefore a trespasser in which case of course there can be no recovery. If he is correct that he was not unlawfully on the train then he shows that his only right on the train was by virtue of the exception to section 1 of the Act, and was therefore a gratuitous passenger in which case the release was valid.

Respectfully submitted,

JOHN H. SMALL,
W. B. RODMAN,
C. M. BAIN,
J. KENYON WILSON,

Attorneys for

Norfolk Southern Railroad Company.

Office Supreme Court, U. S.
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# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1916.**

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## No. 192.

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NORFOLK SOUTHERN RAILROAD COMPANY,
PLAINTIFF IN ERROR,

*vs.*

W. C. CHATMAN.

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**BRIEF FOR DEFENDANT IN ERROR.**

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CHARLES WHEDBEE,
P. W. McMULLAN,
*Attorneys for Defendant in Error.*

**(24,839)**

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IN THE

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1916.**

## No. 192.

NORFOLK SOUTHERN RAILROAD COMPANY,
PLAINTIFF IN ERROR,

*vs.*

W. C. CHATMAN, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

## BRIEF OF DEFENDANT IN ERROR.

In this brief plaintiff in error will be called defendant, or railroad company, and defendant in error will be called plaintiff, or Chatman.

### Statement of the Case.

The statement of the case contained in the defendant's brief is virtually correct, except that it is not claimed by the plaintiff, in his replication, that he was riding upon the train as a party coming within the excepted classes of sec-

tion 1 of the Interstate Commerce Act, permitting passes to be given to caretakers in charge of live stock.

In section 1 of his replication (Record, p. 9) the plaintiff averred that the paper writing evidencing his right to ride upon the defendant's train "was delivered to the plaintiff by the agent of the said Pennsylvania Railroad in consideration of the price paid by the plaintiff for the transportation of said live stock and the plaintiff's caring for said stock en route." And the plaintiff's plea of the exceptions to section 1 of the Interstate Commerce Act, as set out in section 2 of his replication (Record, p. 10), was only by way of further answer to defendant's contention that the plaintiff was riding on said train in violation of law.

## ARGUMENT.

For the purpose of this appeal it is conceded that the plaintiff was injured while riding upon defendant's train, and that the plaintiff was, at the time, in the exercise of due care. An inspection of the record will further show that the negligence complained of, resulting in a derailment caused by rotten ties, was the negligence of the defendant itself, as distinguished from the negligence of its servants, and was of such a nature as to be denominated "gross" in those States where degrees of negligence are recognized.

It is contended by the defendant, however, that the plaintiff is not entitled to recover—

I. Because the plaintiff, at the time of his injury, was a gratuitous passenger, and hence bound by the conditions endorsed upon his "drovers' pass," releasing the defendant from liability for the negligence of itself or its servants, and

II. Because the plaintiff, at the time of his injury, was riding upon the train in violation of law—the issuance of such "drovers' pass" by the defendant company being in violation of the tariff schedule 7 filed by the defendant in

accordance with the provisions of the Interstate Commerce Act.

It is well settled in all jurisdictions that if the plaintiff, at the time of his injury, was a passenger for hire, the release from liability endorsed upon his "drovers' pass" is void and does not bar his recovery. A contract for such exemptions is contrary to public policy, a public policy which is based upon the interest which the State has in the lives of its citizens.

Buckley *vs.* Bangor and A. R. Co., L. R. A., 1916, A. p. 617, and cases cited.

Wilcox *vs.* Erie R. R. Co., N. Y. Supplement 355, and cases cited.

It is equally clear, under the doctrine obtaining in the Federal courts, that if the plaintiff, at the time of his injury, was riding gratuitously, then he is bound by the release from liability, and is not entitled to recover.

Northern Pac. R. R. *vs.* Adams, 192 U. S., 440.

It is doubtful, however, whether this latter doctrine obtains in the State of New Jersey, the place of contract in this case, or in North Carolina, the place of injury. The courts of New Jersey seem to make a distinction between the negligence of the defendant and the negligence of its servants—intimating that a gratuitous passenger may recover for the negligence of the railroad company itself, and not for the negligence of its servants,

Kinney *vs.* Central R. R. Co., 32 N. J. Law, 407,

while in North Carolina, though the question has never been directly presented, the trend of judicial decision strongly indicates that the courts would hold such a release from liability void even as to a gratuitous passenger.

McNeill *vs.* Railroad Company, 135 N. C., 682.

**The Plaintiff in This Case Was a Passenger for Hire.**

With the exception of the State of New York, it has been uniformly held by the courts of the various States, where the question has been presented, that one who is travelling upon what is known as a "drovers' pass" is a passenger for hire. A collection of the authorities will be found in the text of, and notes to, the decision in

Buckley *vs.* Bangor and A. R. Co. (*supra*);

also in

Wilcox *vs.* Erie R. R. Co. (*supra*).

The minority rule, obtaining only in New York, was first enunciated by a divided court in

Bissell *vs.* N. Y. R. R. Co., 25 N. Y., 442,

a decision which the courts of that State have since consistently, though reluctantly, followed.

This is clearly the rule in the Federal jurisdictions. The leading case upon the subject is .

N. Y. C. R. R. Co. *vs.* Lockwood, 17 Wall., 357,

in which the following conclusions were reached:

(*a*) A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law; (*b*) it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants; (*c*) that these principles obtain both with reference to carriers of goods and carriers of passengers for hire, and with especial force to the latter; (*d*) that a drover traveling on a pass, such as was given in this case, for the purpose of taking care of

his stock on the train, is a passenger for hire. This principle was again reaffirmed in

Chicago, etc., R. R. Co. *vs.* Solan, 169 U. S., 133,

where it was held that any contract by which a common carrier of goods or passengers undertakes to exempt itself from the responsibility for loss or damage arising from the negligence of itself or its servants is void as against public policy. This principle is further recognized in that class of cases, of which

Adams Express Co. *vs.* Croninger, 226 U. S., 491,

may be taken as an example, in which case the court, while recognizing the right of a common carrier to limit its liability for loss or damage of goods to the fair valuation of the property, made at the time of the contract, said "that a common carrier cannot exempt himself from liability for his own negligence or that of his servant is elementary."

In Buckley *vs.* Bangor and A. R. Company (*supra*), the reason for the rule is clearly set forth as follows:

> "The question of what is gratuitous carriage has been discussed in a large number of cases known as 'drovers' pass' cases; and it has been universally held that, when a shipper of cattle or other live stock, or his caretaker, is transported in accordance with the contract of shipment, or by arrangement with the company, over the lines of a railroad company, for the purpose of feeding, watering, or otherwise caring for the cattle which he accompanies, either upon what is nominally called a free pass, or upon contract express or implied that no compensation is to be paid for his carriage in addition to what is paid for the transportation of the cattle, he is not traveling gratuitously, but is a passenger for hire, and that any contract by the shipper or by the caretaker exempting the railroad from any liability for the consequences of its negligence to him as such a passenger is void, as under the general rule. The agreement for his carriage is a part of the agreement for the

> transportation of the live stock. It is virtually all one contract. While the compensation paid is professedly for the transportation of the live stock, it involves the condition that the shipper or a caretaker is to be allowed to ride along for the purpose of caring for it. And the consideration for the carriage of the shipper or caretaker is included in the charge made for transporting the stock. The transportation is not a matter of charity or gratuity, but one for a valuable consideration."

In this case the plaintiff, at Newark, New Jersey, tendered to the defendant a shipment of live stock. He was tendered in return by the defendant an alternative contract: Either to pay a higher rate and have the defendant company care for the stock en route, performing the onerous duties imposed upon a common carrier of live stock by the statute, or else to pay a lower rate, upon the condition that he or his representative accompany the shipment, performing himself the onerous duties imposed by the statute upon the carrier. The plaintiff, having selected the latter method of transportation, was compelled to make shipment under a form of contract which bears the self-explanatory name, "Uniform Live Stock Contract."

As to what constitutes the consideration in such a contract the courts seem to be somewhat divided—some courts holding that the consideration is the assumption by the shipper himself of the duties imposed by law upon the carrier and the services performed in the carrier's stead, while other courts, in what seems to the writer to be by far the better reasoning, hold that the contract is an entire contract and that the consideration for the caretaker's transportation is the rate paid professedly for the transportation of the live stock, the reduced rate being due simply to the benefit to the carrier resulting from the assumption by the shipper of the duties which otherwise the carrier would be compelled to discharge. But, with the exceptions above noted, the courts are agreed that the shipper, or caretaker, in such

cases is a passenger for hire. The defendant contends, however, that the above decisions were either rendered prior to, or else were inadvertent to, the amendments to the Interstate Commerce Act, and particularly section 1 thereof, the material portion of which is as follows:

> "No common carrier subject to the provisions of this act, shall, after January 1, 1907, directly or indirectly, issue or give any interstate free tickets, free passes, or free transportation to passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys-at-law, * * * to necessary caretakers of live stock, poultry, milk and fruit."

The defendant further contends that this case is controlled by the decision in

> Charleston & W. C. R. Co. *vs.* Thompson, 234 U. S., 576.

So that a consideration of this case involves necessarily a construction of the amendments to the Interstate Commerce Act as well as an interpretation of the decision in the Thompson case.

**Plaintiff Was Not a Gratuitous Passenger under the Provisions of the Interstate Commerce Act.**

In the passage of the act of June 29, 1906, amendatory to the Interstate Commerce Act of 1887, and commonly known as "The Hepburn Act," it was not the purpose of Congress to create a new class of "free passes." The passage of the Hepburn act was the outcome of a public agitation against a continuance of the practice by the railroads of issuing "free passes." It was clamorously alleged against the railroads that these "free passes" were issued for ulterior purposes—ends foreign to the purposes for which common

carriers were permitted to exist. Whether this agitation had for its basis a substratum of truth it is not the province of this inquiry to determine. It is sufficient that it existed as the inspiration of the Hepburn act, and the purpose of this act is therefore accomplished, and its spirit satisfied, by a prohibition of the continued issuance of those passes, which were in fact and in the strictest sense "free," and for which no other consideration, if any, moved to the railroads than the goodwill, favor, and influence of the recipient of such "free passes." The purpose and spirit of such legislation did not require or apprehend a prohibition of that class of transportation, whether evidenced by a ticket, certificate, pass, or otherwise, which was based upon a valuable consideration moving to the railroads, and which could not, by the hardiest stretch of the imagination, be alleged to proceed from ulterior motives.

Nor has Congress, in the passage of the Hepburn act, created a new class of "free passes." The prohibition of the act, shorn of its exceptions, is confined to those passes which, at the time of the passage of the act, were "free" in fact. The Hepburn act, in so far as it relates to "free passes," and shorn of its exceptions in this regard, is as follows:

> "No common carrier subject to the provisions of this act, shall, after January 1st, 1907, directly or indirectly, issue or give interstate free tickets, free passes, or free transportation for passengers."

It is not to be conceived that Congress, at the time of the passage of this act, was ignorant of the long line of judicial decisions, which universally held one traveling on a "drovers' pass" to be a passenger for hire. The conclusion, then, is obvious that if Congress had intended to prohibit the issuance by common carriers of "drovers' passes" to necessary caretakers in actual charge of shipments of live stock, it would have used language appropriate to this end. It is further obvious that the conten-

tion that the issuance of "drovers' passes" is prohibited by the act itself, above quoted, as distinguished from its exceptions, is inherently unsound.

It is contended by the defendant, however, that Congress, by appending to the act above quoted the exceptions appearing in the act, one of which is directed to "necessary caretakers" of live stock, poultry, milk, and fruit, has shown an intention to bring the excepted classes within the prohibition of the act, the result being that no one of the excepted classes may longer receive transportation from a common carrier, save only by the authority of the exception itself, and hence becomes, by the very acceptance of such transportation, a free or gratuitous passenger, irrespective of the service to be performed, or the consideration to be paid for such transportation.

In passing, the authority of Congress to transform a passenger for hire into a gratuitous passenger may well be doubted. The authority of Congress to regulate interstate commerce, and by virtue of such power of regulation to enact that a person injured while riding on a "drovers' pass" shall not be permitted to recover against the common carrier, is beyond all question. But Congress has not so enacted. And the power to so enact is very different from the power to transform, by a stroke of the pen, a contract based upon a valuable consideration into an *nudum pactum*.

Speculation in this regard is, however, idle, since Congress has attempted no such exercise of power. It has been noted before that the Hepburn act, considered apart from its exceptions, contains no prohibition against the issuance of the "drovers' pass." Nor does the exception, as to necessary caretakers of live stock, etc., have such effect. The sole office of an exception is to take out of an enactment something which would otherwise be part of the subject-matter of it; to exempt from the prohibition of an act something which would otherwise be prohibited.

Black's Interpretation of Laws, p. 271.

If it be conceded, then, that the act itself contains no prohibition against the "drovers' pass," it follows necessarily that the act cannot be given this effect by means of the exceptions relied on.

It may be insisted, however, that such a construction of the act would leave this exception shorn of meaning. Even so, it is submitted, the settled rules of construction of statute may not be violated to give force and effect to this exception. And even so, it is further submitted, it would be better to hold this exception meaningless than to give it the force of a prohibitive enactment, which, without rhyme or reason, in law or conscience, would deprive this plaintiff and others of his class of their common-law rights, and overturn the well-settled public policy of both States and Nation.

But such a construction does not leave this exception meaningless. It was the purpose of Congress in the passage of this act—a purpose effectuated by the terms of the act—to prohibit the issuance of those "free passes" which might be deemed inimical to the public welfare, and to permit the common carriers, by means of these exceptions, to continue to issue, in their discretion, such other "free passes" as could not be deemed to hold such menace. Under the act itself, the issuance of free passes is prohibited; by virtue of the exception quoted the issuance of a "free pass" to a caretaker of live stock is authorized and permitted when, and only when, such pass is free in fact. Did such case fall within the contemplation of Congress?

It is a matter of common knowledge, and must be deemed to have fallen within the contemplation of Congress, that at the time of the passage of this act there was in existence a long-continued custom of common carriers by railroad to issue passes to shippers or caretakers of stock, after the shipment had reached its destination and been delivered, for the return passage home—that is to say, that a shipper would accompany his shipment of stock as caretaker to the point

of destination, and then would receive from the carrier a free pass to the point of shipment. This practice was existent as a matter of common knowledge. And it is manifest that passes so issued were, in the strictest sense, free.

The purpose of Congress in appending this exception to the statute, then, becomes clear. It was simply to permit the continued issuance of these "free passes" returning, a practice universally indulged, and in which even the most captious critic could find nothing hostile to the public weal. Such, at least, seems to have been the construction placed upon this exception by the defendant company, for in its schedule of tariffs (Record, p. 26) we find this provision relating to the transportation of shippers or caretakers of live stock:

> "Free or reduced transportation shall not be issued for shippers or caretakers in charge of live-stock shipments, whether carload lots or less, and such shippers or caretakers shall pay full fare, returning."

It is manifest, then, it is submitted, that there is nothing in this act, when properly construed, to transform the plaintiff from a passenger for hire into a gratuitous passenger, or to give validity to the release from liability endorsed upon his "drovers' pass."

**This Case Not Controlled by the Thompson Case.**

It is further contended by the defendant, however, that the questions here presented have been decided against the plaintiff in the case of Charleston & W. C. R. Co. *vs.* Thompson (*supra*). In that case the railroad company had issued to the wife of one of its employees a "free pass." Plaintiff, while riding upon such pass, was injured by the negligence of the railroad company. It was held that the plaintiff was a gratuitous passenger, and was barred of recovery by the release from liability endorsed upon her pass. It did not appear in this case that the plaintiff performed any service

for the railroad at all, nor did it appear that it was a part of the contract between the railroad company and the plaintiff's husband that passes should be issued to plaintiff. It did appear that plaintiff, by virtue of such pass, was traveling upon the regular passenger trains and in the regular passenger coaches of the defendant company. These being the facts, it is apparent that the pass issued to the plaintiff in that case was a "free pass" in the strictest sense, and that, under the doctrine declared in

Northern Pac. R. R. *vs.* Adams, 192 U. S., 440,

the plaintiff was barred of a recovery by the release she executed, irrespective of the provisions of the Hepburn act. In a word, she was a gratuitous passenger, in fact, and hence bound by the stipulations in her release. It is hard to conceive, however, how the Thompson case can be relied upon as authority in this case. The facts are fundamentally different. In the Thompson case the court was determining the rights of a gratuitous passenger; in this case, of a passenger for hire.

It may be conceded that there are isolated expressions in the Thompson case which would seem to render it an authority for this case. But so there are isolated expressions in the Bible which would seem to support immorality. A careful analysis of the Thompson case will show its vast distinction from this case, both in fact and in the principles of law controlling.

It was said in the Thompson case: "The railroad was under no obligation to issue a pass." This is true. But how different under the facts in this case. It is to be borne in mind that Section 4386, U. S. Comp. Statutes, 1901, prohibits the confinement of cattle, sheep, or other animals, transported from one State to another, for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water, and feeding. This requirement of the statute renders a caretaker necessary in interstate ship-

ments of live stock. And necessity means obligation. The defendant, then, was obligated to have a caretaker for this shipment. And it was simply in fulfillment of this obligation, imposed by the statute, and for reasons that it deemed beneficial to itself, that the defendant agreed to transport plaintiff as such caretaker.

Moreover, it is submitted, a shipper of live stock has a right, in law, to accompany same as caretaker if he so desires. A shipper oftentimes would be unwilling to entrust a valuable shipment of live stock to the untrained care of an inexperienced train crew. Long-continued usage and custom of common carriers, in this regard, shows a recognition of this right. And if such usage and custom were now discontinued, it is submitted, a reinstatement of such practice would be compelled. It is the right of the shipper to accompany his stock at his option; and the corresponding duty of the carrier to provide, in his schedule of tariff, for such transportation.

The court said further, in the Thompson case—

> "it may be doubted whether it could have entered into one (an obligation to issue the pass), for then the service would be the consideration for the duty and the pass, and by section six it was forbidden to charge 'a greater, or less, or different compensation' for the transportation of a passenger from that in its published rates."

It may be conceded in this case that the pass to Mrs. Thompson would have been unlawful, or, at least, still gratuitous, if issued in consideration of service on her part. The provisions of section 6 of the Interstate Commerce Act unquestionably prohibit a discrimination in the rates charged passengers traveling in the same class, between the same points. A common carrier is prohibited charging one passenger a stipulated sum of money and another passenger of the same class a stipulated service. But there is nothing in the provisions of such section which requires a common

carrier to charge a caretaker of live stock, traveling on a freight train, subject to all the ordinary hazards of that form of locomotion, the same rate of fare as it charges its passengers *de luxe*. The carrier has the right to charge different rates to different classes of passengers, provided only there be no discrimination between passengers of the same class. There are no such discriminations here. Every shipper of the same class, traveling under similar circumstances and between the same points, was entitled to all the privileges accorded plaintiff. (See Record, pp. 20 to 26, inclusive.)

It is stated in defendant's brief, page 26, that, "A caretaker does not accompany the stock in ninety per cent of the shipments." This fact is without interest to this case, since, under defendant's published rates, every shipper under the uniform live-stock contract, is not only privileged to do so, but, under the provisions of such contract itself, is compelled to do so.

The Thompson case further says:

> "To most of those enumerated the 'free pass' obviously would be gratuitous in the strictest sense. And all that may receive them are grouped in a SINGLE EXCEPTION, we think it plain that the statute contemplates the pass as gratuitous in the same sense to all."

It is to be observed that there are appended to the Hepburn act, not a SINGLE EXCEPTION, but eight exceptions, each separated from its fellows by a semicolon. It is to be observed further that these eight exceptions embrace over forty classes of potential passengers by railroads. It is difficult to conceive, therefore, that the decision in the Thompson case intended, in passing upon a single exception to the act, to dispose of the other seven exceptions, or, in determining the rights of one class of passengers, to conclude the rights of the thirty-nine other classes.

It is to be remembered further that the opinion in the

Thompson case cites, with approval, the case of Northern Pac. R. Company *vs.* Adams, in which the Lockwood case is distinguished, and so by plain implication, at least, cites with approval the Lockwood case.

And it is to be further borne in mind that unless the plaintiff's reasoning hereinbefore submitted is incorrect the plaintiff falls within the contemplation of neither of the eight exceptions to the Hepburn act. That, being at the time of the passage of the act, under the universal holding of the courts, a passenger for hire, his case lies wholly without the operation of the act and its exceptions.

The fundamental objection, however, to the Thompson case, as an authority in this case, is that the facts of the two cases are essentially different, and the extracts relied on as authority are *obiter dicta*. The rule, *Stare Decisis*, is wisely qualified by confining the operation of judicial decisions, as precedents, to those cases in which the same or a similar state of facts is presented.

The rule is well expressed in

Powers *vs.* Village of Mechanicsville, 163 N. Y. App. Div., 138-140,

as follows:

> "The reasoning, illustrations and references contained in the opinion of the court, are not authority, not precedent, but only the points arising in a particular case, and which are decided by the court."

It is therefore submitted that there is nothing in the opinion in the Thompson case, under a proper construction of the Hepburn act, which alters the relation of passenger and carrier, existing between plaintiff and defendant company, as universally declared in the decisions of the courts.

If, however, the Thompson case be controlling of this case, and the plaintiff were a gratuitous passenger at the time of his injury, it still does not follow that his recovery

is barred. Under the rulings of this court, it is not the gratuitous passenger who is barred of a recovery for injuries resulting from the negligence of the carrier, but only the gratuitous passenger who has executed a valid release from liability. The question, then, is presented, assuming the plaintiff to have been a gratuitous passenger, was the release from liability executed by him a valid release? Section 6 of the Interstate Commerce Act requires a carrier to publish a schedule of its rates, fares and charges, and further prohibits any carrier from charging or receiving a greater or less or different compensation than those specified in such schedule.

By the act of February 19, 1903, known as "The Elkins Act," amending the Interstate Commerce Act of 1887, it is made

> "Unlawful for any person, persons or corporation to offer, grant or give, or to solicit, accept or receive any rebate, concession or discrimination, in respect of the transportation of any property in interstate or foreign commerce by any common carrier, subject to said Act to Regulate Commerce, and the acts amendatory thereto, whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariff published and filed by such carriers, and the Act to Regulate Commerce, and the act amendatory thereof, or whereby any other advantage is given or discrimination practiced."

In the schedule of rates filed by the defendant company (Record, pp. 20-26) the rate fixed for the transportation of a carload of live stock from Newark, New Jersey, to Hertford, North Carolina, is $76.50. The schedule further contemplates and provides for a caretaker. And there is no reference in the schedule to any release from liability which such caretaker must execute as a condition of his accompanying said stock.

The question presented, then, is simply this: Can a carrier lawfully impose such a release upon a caretaker when

same has not been provided for in its schedule of rates? It is respectfully submitted that the imposition of such a release is in violation of defendant's own published schedule, and constitutes the very discrimination that section 6 of the Interstate Commerce Act, and the provisions of the Elkins act, were designed to prevent.

In Chicago & Alton R. R. *vs.* Kirby, 225 U. S., 155, the court said:

> "An advantage accorded by special agreement, which affects the value of the service to the shipper and its cost to the carrier, should be published in the tariffs, and for a breach of such contract, relief will be denied, because its allowance without such publication is a violation of the act. It is also illegal because it is an undue advantage, in that it is not open to all in the same situation."

**The Plaintiff, at the Time of His Injury, Was Not Riding on Defendant's Train in Violation of Law.**

Section 6 of the Act to Regulate Commerce provides, among other things, as follows:

> "Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for transportation of passengers or property or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs."

It is further contended by the defendant that, while it was permitted under the exceptions to section 1 of the Interstate Commerce Act, to give free transportation to necessary

caretakers of stock, it was not required to do so, and that, having in its election published a schedule of tariffs whereby such caretakers were required to pay full fare, both the carrier and shipper were bound by said schedule, and that the transportation issued to the plaintiff was in violation of law. This brings us to a consideration, in the first place, of the schedule of tariffs published by the defendant company. Such schedule is set out in the record (pp. 20-26, inc.), and after providing for the shipment at the rate of $76.50, and for a man in charge of such shipment, contains the following provision, relied upon by the defendant in support of his contention:

> "Free or reduced transportation shall not be issued for shippers or caretakers in charge of live stock shipments, whether carload lots or less, and such shippers or caretakers shall pay full fare, returning."

It is obvious from a mere reading of the above provision that the defendant is in error when it says, in its brief, that its published rates required the payment of the regular passenger fare by a caretaker actually in charge of live stock. To have this effect, it is submitted, the provision would have to be rewritten. This provision, in the first place, must be read in connection with the entire schedule relating to live-stock shipments. It must be interpreted in the light of its context. And in this schedule, of which this provision is a part, we find it provided that the shipment must be accompanied by a caretaker, denominated as a "man in charge," and further, that the rate upon the entire shipment, including the necessary accessories, is $76.50. The inference is plain that this rate is intended to cover the entire service to be rendered by the carrier. And if this inference be incorrect, then the inquiry suggests itself, why is not the rate to be paid by the caretaker specified, since the provisions of section 6 require the publication of the entire rate to be charged?

Moreover, it is apparent, as above suggested, that the purpose of this provision in the schedule is simply to require such caretaker to pay the regular rate returning.

In other words, the plain meaning of the defendant's published schedule of rates is simply this: That in consideration of the sum of $76.50 the defendant would transport a carload of live stock, including a caretaker, from Newark, New Jersey, to Hertford, North Carolina, and the insertion of the provision above quoted is merely to prevent the inference of obligation upon the carrier, by reason of common usage or custom heretofore existing, to issue free transportation to such caretaker, returning either to point of shipment or other point desired.

It follows that the plaintiff, at the time of his injury, was not riding on defendant's train in violation of law.

**Even Though Plaintiff, at the Time of His Injury, Was Riding in Violation of Law, He is Still Entitled to Recover.**

If it be conceded, however, that the plaintiff, at the time of his injury, was on the train in violation of law, it does not follow that he is barred of a recovery in this action.

It is not contended that an illegal contract may be made the basis of a recovery. No action may be maintained for its enforcement or its breach. The plaintiff's action, however, is not in contract, but in tort. Its basis is not a contractual relation between plaintiff and defendant, but a public duty, imposed upon the defendant by law, for reasons of public policy; it finds its origin and its sanction, not in such contractual relation, but in the duty which immediately devolves upon every common carrier that voluntarily assumes the care of a human being, to exercise a reasonable degree of care for his safety. The plaintiff in this case was not a trespasser. He had been admitted to the car upon which he was riding at the time of his injury by defendant's connecting carrier, the Pennsylvania Railroad.

There had been delivered to him a "drovers' pass" which, upon its face, at least, accorded him the right to transportation. He was seen by defendant's conductor at Norfolk, Virginia, where the defendant, without suggestion from him, assumed charge of the car in which he was riding. His presence on such car was, then, not against the will of the defendant, but with its full acquiescence and assent. And if his presence there were unlawful, the defendant, itself a wrongdoer, may not be permitted to take advantage of its own wrong, to assume the championship of the public morals, and to insist that the plaintiff be penalized beyond the scope and contemplation of the statute prescribing his punishment.

That there are respectable authorities holding the contrary view is not denied. It is submitted, however, that the greater weight of authority, and the better reasoning, is in support of the view above set forth. In

McNeill *vs.* R. R. Co., 135 N. C., 682,

the authorities supporting this view will be found collected. The opinion in this case is, too, a cogent argument for the plaintiff. In this case the plaintiff, at the time of his injury, was riding upon a train admittedly in violation of the anti-pass statute of the State of North Carolina. He was riding, nevertheless, with the consent of the railroad's agents, upon a pass issued by the defendant railroad. It was held that he could recover. In

Southern Pac. R. Co. *vs.* Schuyler, 227 U. S., 601,

the plaintiff, Schuyler, was injured, while riding on defendant's train, by a derailment in the State of Utah. At the time of his injury he was traveling upon a pass issued to him as a mail-service employee. It was insisted by the defendant that he could not recover; for that at the time of his injury he was traveling upon his own private business,

and that his presence on the train by virtue of such a pass was therefore unlawful. The Supreme Court of Utah held that, even though he were unlawfully upon the train, yet—

> "Under all the circumstances of the case, the appellant, having undertaken and assumed to carry and transport the deceased as a passenger, by reason of the commission, cannot escape liability for the consequences of its negligence on that ground; and further, that the railroad could not escape liability by urging that the pass or commission was issued, or a gratuitous passage permitted, in violation of law."

In affirming the decision of the Supreme Court of Utah, Justice Pitney said:

> "Whether the Hepburn act prohibits a carrier from giving free interstate transportation to the employees of the railway-mail service when they are not on duty, but are traveling for their own benefit or pleasure, is, of course, a Federal question. But whether—assuming that question to be answered in the affirmative—the relation of carrier and passenger arises in the case of gratuitous passage under circumstances such as are presented in this case is (in the absence of an act of Congress regulating the matter) a question not of Federal, but of State, law. * * * We have examined the evidence in the record, and find that it fairly supports the conclusion of the State court that the deceased was accepted by plaintiff in error as a gratuitous passenger. But, finally, it is argued that it was beyond the power of the State court to 'read into the Hepburn act an exception in favor of gratuitous passengers,' thereby (as it said) enlarging the class to whom Congress limited the right of free transportation. This is ingenious, but, as, we think, unsound. As applied to the concrete case, it is equivalent to saying that the operation of the Hepburn Act is such as to deprive one who, in good faith and without fraud, and with the consent of the carrier, but in actual, though unintentional, violation of the prohibition of the act, accepts a free passage in interstate transportation, of the benefit of

a local (rule of) law that renders the carrier in such circumstances responsible for exercising care for the passenger's safety because the carrier has voluntarily undertaken the burden of such care. But the act itself declares what penalty shall be imposed for a violation of its prohibition. * * * This penalty is not to be enlarged by construction. Neither the letter nor the spirit of the act makes an outlaw of him who violates its prohibition by either giving or accepting gratuitous interstate carriage. The deceased no more forfeited his life, limb, or safety, and no more forfeited his right to the protection accorded by the local law to a passenger in his situation, than the carrier forfeited its right of property in the mail car upon which the deceased rode. His right to safe carriage was not derived, according to the law of Utah, from the contract made between him and the carrier, and therefore was not deduced from the supposed violation of the Hepburn act. It arose from the fact that he was a human being, of whose safety the plaintiff in error had undertaken the charge. With its consent he had placed his life in its keeping, and the local law thereupon imposed a duty upon the carrier, irrespective of the contract of carriage. The Hepburn act does not deprive one who accepts gratuitous carriage, under such circumstances, of the benefit and protection of the law of the State in this regard."

**Conclusions.**

The plaintiff's contentions may be briefly summarized as follows:

I. That at the time he was injured he was a passenger for hire, and that the release from liability executed by him is therefore void.

II. That even were he a gratuitous passenger at the time of his injury, under the provisions of the Hepburn act and the ruling in the Thompson case the said release is neverthe-

less void, since it was not provided for in the schedule filed by the defendant, and could not, in the absence of such specification, have been lawfully imposed upon the plaintiff as a condition of his accompanying said shipment.

III. That the plaintiff, at the time of his injury, was riding on the defendant's train in full compliance with the schedule of rates and tariffs, filed by the defendant company, and hence was not riding in violation of law.

IV. That even if riding in violation of law the plaintiff was on the defendant's train with the defendant's full consent and acquiescence, and that the defendant owed plaintiff the common-law duty of exercising a reasonable degree of care for his safety.

Respectfully submitted,

CHAS. WHEDBEE AND
P. W. McMULLAN,
*Attorneys for Plaintiff.*

# NORFOLK SOUTHERN RAILROAD COMPANY *v.* CHATMAN.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 192. Argued April 20, 1917.—Decided May 21, 1917.

Under the doctrine established by *Railroad Company* v. *Lockwood*, 17 Wall. 357, and many cases decided since, a person traveling by railroad as a caretaker of live stock on a "free" or "drover's" pass is a passenger for hire as to whom a stipulation that the carrier shall not be liable for personal injuries caused by its negligence is void.

As applied to caretakers of live stock, § 1 of the Hepburn Act of June 29, 1906, uses the term "free pass" in the sense which established custom had given it and judicial determination had sanctioned long before the act, viz., as meaning not a gratuitous pass but one issued for a consideration constituting the caretaker a passenger for hire, within the doctrine of the *Lockwood Case*. *Charleston & Western Carolina Ry. Co.* v. *Thompson*, 234 U. S. 576, distinguished.

Where a connecting carrier, sued for personal injuries by a person traveling on a drover's pass, based its defense on a release of liability for negligence contained in the contract of carriage issued by, and in accordance with the tariffs of, the initial carrier, under the Carmack Amendment, *Held* that it was estopped from claiming also that under its own tariff the issuance of such passes was forbidden and unlawful and that therefore such traveler was unlawfully upon its train.

A provision in a tariff that "free or reduced transportation shall not be issued for shippers or caretakers in charge of live stock shipments, . . . and such shippers or caretakers shall pay full fare *returning*," is construed as implying that such transportation will be allowed to the destination of the shipment, but not for the return trip of the caretaker.

When connecting interstate carriers, in accordance with tariffs of the initial carrier duly filed and published, contract to carry a shipment of live stock with a caretaker for a specified rate in money, the carriage *quoad* the caretaker is a carriage for money, part of the total rate, and the mere fact that the part attributable to the caretaker is

not stated separately in a passenger tariff does not render the contract to carry him invalid under the Act to Regulate Commerce.

Separation of the rate in such a case is an administrative matter affecting the form of tariffs, which is committed to the Interstate Commerce Commission by § 6 of the Commerce Act, as amended, and concerning which the courts will not interfere in advance of application to the Commission.

222 Fed. Rep. 802, affirmed.

THE case is stated in the opinion.

*Mr. C. M. Bain* (by special leave), with whom *Mr. John H. Small, Mr. W. B. Rodman* and *Mr. J. Kenyon Wilson* were on the briefs, for plaintiff in error.

*Mr. Charles Whedbee* and *Mr. P. W. McMullan* for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

The judgment obtained in this case by the plaintiff in the District Court, W. C. Chatman, affirmed by the Circuit Court of Appeals for the Fourth Circuit, is here for review on writ of error.

On December 1, 1911, the plaintiff below (hereinafter designated as the plaintiff) delivered to the Pennsylvania Railroad Company at Jersey City a carload of horses to be carried to Hertford, N. C., and was tendered by an agent of the company for his signature the customary "Uniform Live Stock Contract" of the Pennsylvania Company, the essential provisions of which are printed in the margin.[1]

[1] The provisions of the contract essential to be considered are, in substance, that the company had received from Chatman a carload of horses for transportation to Port Norfolk for Hertford, N. C., "with W. C. Chatman in charge;" and that it was received by the Pennsylvania Company "for itself and on behalf of connecting carriers for

This contract was retained by the company but from it was detached a "coupon" which was given to Chatman, containing, in substance, an acknowledgment that he had delivered live stock of the kind and nature therein described, consigned to W. C. Chatman, destination Port Norfolk, Va., for Hertford, N. C., "W. C. Chatman, man

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transportation, subject to the official tariffs, classifications and rules of the said company"; and "that the said shipper is at his own sole risk and expense to load and take care of and feed and water said stock whilst being transported . . . and neither said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same . . . That the shipper shall see that all doors and openings in said car or cars are at all times so closed and fastened as to prevent the escape therefrom of any of the said stock." It further provided that in consideration of the premises and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carriers without charge, other than the sum paid or to be paid for the transportation of the live stock in his or her charge, that the said shipper shall and will indemnify and save harmless said carrier and every connecting carrier from all claims and liabilities of every kind, by reason of personal injury sustained by the person in charge of said stock, whether the same be caused by the negligence of said carrier or any connecting carrier, or otherwise.

There was printed upon this contract, as a part of it, the following:

"RELEASE FOR MAN OR MEN IN CHARGE.

"In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract without charge, other than the sum paid or to be paid for the carriage upon said freight train of the livestock mentioned in said contract, of which livestock . . . in charge, the undersigned does hereby voluntarily assume all risks of accidents or damage to his person or property, and does hereby release and discharge the said carrier or carriers from every and all claims, liabilities and demands of every kind, nature and description for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employees or otherwise.

(signature of man in charge)
W. C. CHATMAN."

in charge." Without other pass or ticket than this "coupon" and without other payment than the published tariff on the carload of stock, the Pennsylvania Railroad Company carried the plaintiff, with his carload of horses, on a freight train to Norfolk, Virginia, where the car was delivered to and accepted by the defendant company for transportation to its destination.

The plaintiff testifies that defendant's conductor saw him and knew he was on the car up to the time the accident complained of occurred.

The car in which the horses and the plaintiff were being carried was derailed on defendant's line, and the plaintiff, being injured, sued for damages and secured the judgment which we have before us.

The negligence of the defendant is not disputed.

On this record the defendant claims two defenses, the first of which is:

That the plaintiff is not entitled to recover, because, when injured, he was traveling on a free pass issued pursuant to the terms of the live stock contract in which he had released the carriers from all liability for any personal injury which he might sustain, thus bringing his claim within the authority of *Northern Pacific Ry. Co.* v. *Adams*, 192 U. S. 440.

In *Railroad Company* v. *Lockwood*, 17 Wall. 357, 384, it was decided that a person traveling on a "drover's pass," issued upon a live stock contract precisely similar in its terms to that which we have in this case, was a passenger for hire and that a release from liability for injuries caused by the carrier's negligence was void because a common carrier could not lawfully stipulate for such exemption.

This decision was rendered in 1873, and has been frequently approved: *Railway Company* v. *Stevens*, 95 U. S. 655; *Liverpool & Great Western Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397; *Baltimore & Ohio Southwestern*

*Ry. Co.* v. *Voigt*, 176 U. S. 498, 505; *Santa Fe, Prescott & Phœnix Ry. Co.* v. *Grant Brothers Construction Co.*, 228 U. S. 177, 184; *Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278, 283. This court continues of the opinion expressed by it in 1900, in *Baltimore & Ohio Southwestern Ry. Co.* v. *Voigt, supra*, that the *Lockwood Case* must "be regarded as establishing a settled rule of policy."

But the plaintiff in error claims that this rule is no longer applicable to such a case as this we are considering, for the reason that, while the plaintiff as the shipper of the stock was within the exception of § 1 of the amendment to the act "to regulate commerce" of June 29, 1906, 34 Stat. 584, prohibiting the issuance of any "interstate . . . free pass . . . except . . . to necessary care takers of live stock, poultry and fruit" yet this exception permitted him to travel free of charge upon a "free pass or free transportation," and not as a passenger for hire on a free pass, which would be a contradiction in terms.

The *Lockwood Case* shows that live stock contracts such as we have here, providing for the transportation of caretakers of stock on free passes, were in use by carriers as early as 1859 (17 Wall. 357, 365), and that they have continued in use up to this time is apparent from the decisions hereinbefore cited, from the case at bar and from many recently reported cases. *Tripp* v. *Michigan Central R. R. Co.*, 238 Fed. Rep. 449. Notwithstanding the fact, as we have seen, that such transportation has been declared by a long line of decisions not to be "free" in the popular sense, but to be transportation for hire, with all of the legal incidents of paid transportation, the carriers of the country have continued to issue it and to designate it as "free."

With this legal and commercial history before us we must conclude that the designation "free pass," as applied to transportation issued or given by railroad companies to

shippers and caretakers of stock, had acquired a definite and well known meaning, sanctioned by the decisions of this court and widely by the decisions of the courts of the various States, long prior to the enactment of June 29, 1906, and that, therefore, Congress must be presumed to have used the designation "free pass" in the sense given to it by this judicial determination when, in § 1 of that act, by specific exception, it permitted the continuance of the then long established custom of issuing free transportation or passes to shippers or caretakers of live stock. *Kepner* v. *United States*, 195 U. S. 100; *Lawder* v. *Stone*, 187 U. S. 281, 293; Sutherland on Statutory Construction, § 333.

It results that the "settled rule of policy" established by the *Lockwood Case*, and the decisions following it, must be considered unmodified by the Act to Regulate Commerce, that the plaintiff in charge of his stock, traveling upon a pass permitted to be issued by that act, was a passenger for hire, and that defendant's first claim must therefore be denied.

The claim of the defendant that the plaintiff was unlawfully upon its train because its published tariff did not allow the issuing of such a pass as that which the plaintiff was using when injured is without merit.

The extract from the defendant's tariff relied upon to sustain this claim reads:

"Free or reduced transportation shall not be issued for shippers or caretakers in charge of live stock shipments, whether carloads or less, and such shippers or caretakers shall pay full fare *returning*."

It is sufficient answer to this claim to say that the railroad company is here defending under the release from liability contained in a contract of carriage, issued as required by law (§ 7 of the Act of June 29, 1906, 34 Stat. 595), pursuant to the published tariffs of its connecting, the initial carrier, the Pennsylvania Railroad Company,

and it will not be heard in the courts to urge the inconsistent defense that its own tariff made unlawful this contract on which in the alternative it relies.

To this we add that passes for caretakers, not only to destination but returning to point of shipment, were formerly general (*Cleveland, Painesville &c. R. R. Co.* v. *Curran*, 19 Ohio St. 1), and in some parts of the country are still issued (*Kirkendall* v. *Union Pacific R. R. Co.*, 200 Fed. Rep. 197, 200), and that, in our opinion, the language of the notice quoted, while obscurely worded, implies that such passes will be issued by the defendant to destination of the shipment and was intended as notice to shippers that return passes would not be allowed. The meaning now claimed for this notice would have been unmistakably expressed without the final clause "and such shippers or caretakers shall pay full fare *returning*." Why "returning" if full fare were also to be paid "going"? Tariffs must not be made cunningly devised nets in which to entangle unsuspicious or inexperienced shippers.

The second defense of the railroad company is in the alternative, and must be considered because its first defense has failed.

This claim is that under the Interstate Commerce Law payment for the transportation of passengers for hire could be made only in money, and at a rate stated in a tariff filed and published in the manner required by law; that no separate payment for plaintiff's transportation was made in money, and the consideration for it must be found, if at all, incorporated in the rate charged for the stock or in the service which he was to render in caring for it in transit, and that, as neither of these was separately stated in any filed and published tariff the plaintiff's presence upon the car was unlawful and he should not recover for injuries sustained.

In the consideration of this second claim of the defend-

ant these facts appearing of record are decisive: The defendant relies for its defense upon the terms of the live stock contract entered into between its connecting carrier the Pennsylvania Company and the plaintiff and, averring in its answer that it received the shipment of horses "in accordance with the terms of the said contract," it claims immunity from liability for damages to the plaintiff under the declaration of that contract, that: "In consideration of the carriage of the undersigned [plaintiff] upon a freight train of the carrier or carriers named in the within contract without charge, other than the sum paid or to be paid for the carriage . . . of the live stock" the plaintiff assumed the risk of accident and released said carrier or carriers from all liability to him for any injury which he might sustain.

While the record is not as clear as could be wished the excerpts which it contains from the filed tariffs of the Pennsylvania Company and the live stock contract, both introduced in evidence by the defendant, justify the conclusion, certainly as against the defendant, that the contract was a part of the tariffs of the Pennsylvania Company filed and published according to law and that the defendant is bound by its terms.

Treating this live stock contract as a part of the lawfully published tariffs of the Pennsylvania Company, under which the contract for the carriage of the plaintiff was made, and by which the defendant confesses itself bound, it is clear that such tariffs show the two carriers declaring that for the published rate payable in money the plaintiff's carload of stock and the plaintiff himself, as a caretaker, would be carried on freight trains from Jersey City to the North Carolina destination, and as we have seen the law declares that a caretaker so carried is a passenger for hire against whom the release of liability on which the defendant relies must be treated as unreasonable and void.

The objection that the published tariff of the Pennsylvania Company did not specify how much of the stipulated payment by the plaintiff should be treated as payment for the transportation of the stock and how much for the transportation of the caretaker, and that the payment for the carriage of the plaintiff was not separately stated in a passenger tariff, cannot be considered in this case for the reason that the Act to Regulate Commerce (§ 6, as amended June 29, 1906, June 18, 1910, and August 24, 1912) commits to the Interstate Commerce Commission the determining and prescribing of the form in which tariff schedules shall be prepared and arranged, and this is an obviously administrative function with which the courts will not interfere in advance of a prior application to the Interstate Commerce Commission. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 232 U. S. 199, 221; *Texas & Pacific Ry. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138.

It results that the second claim of the defendant must be rejected because the fare of the plaintiff was paid in money pursuant to published tariffs, which clearly showed the terms of the shipment of the stock with transportation for the plaintiff included, in a form which in the state of this record must be considered as having been satisfactory to the Interstate Commerce Commission, to which the determination of such form was committed by law.

The claim that *Charleston & Western Carolina Ry. Co.* v. *Thompson*, 234 U. S. 576, rules this case cannot be allowed, for the sufficient reason that the plaintiff in that case was found to be traveling upon a gratuitous pass, issued without consideration to a member of the family of an employee. Behind such a pass there lay no such background of court decision and of railroad practice as we have here, giving definite interpretation to the statute as applied to "caretakers' passes" and therefore that case fell without the scope of the *Lockwood* decision and within

the principle of *Northern Pacific Ry. Co.* v. *Adams*, 192 U. S. 440, and *Boering* v. *Chesapeake Beach Ry. Co.*, 193 U. S. 442.

The judgment of the Circuit Court of Appeals is

*Affirmed.*